> "any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian Affairs."

This act was modified by joint resolution of May 19, 1926, 44 Stat. 458, permitting plaintiff to bring separate suits on one or more causes of action; and by the act of Congress approved February 19, 1929, c. 268, 45 Stat. 1229, the time for filing such suits was extended to June 30, 1930 (R. 10).

On February 24, 1930, the Seminole Nation filed the original petition requesting an accounting by the United States of disbursements under "various treaties and agreements," and under various acts of Congress governing disbursements from the Seminole trust funds, and after reciting specifically Section 19 of the Curtis Act, and Section 2097 Revised Statutes, the petition states that "thus in violation of law" certain expenditures were made by defendant, and that the facts were within the sole knowledge of defendant. The petition then prayed that after receipt of the accounting report requested, "plaintiff be permitted to amend this petition, and that plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law." (R. 1, 2)

The accounting requested in the original petition was filed by defendant in the court below on September 9, 1934. Having had access to this report before the date of its filing, plaintiff below, on September 4, 1934, asked leave of court to file an amended petition to set up facts disclosed in the accounting report. This leave was granted, and on September 19, 1934, the amended petition was filed. (R. 3)

The amended petition sets forth specifically the *items* of illegal disbursement from Seminole funds made in violation of the terms of treaties and agreements and other illegal disbursements of Seminole funds made in violation of various acts of Congress governing same (R. 3-8), as shown by

the Report of the General Accounting Office. The defendant below filed no objection to the amended petition either at the time it was filed, or at the time of the trial (R. 16), and this amended petition, together with the report of the General Accounting Office, furnished the basis upon which this case was tried in the lower court (R. 16).

The Cause of Action.

The cause of action presented in both the *original* and *amended* petitions was the illegal disbursement by the Secretary of the Interior of respondent's funds arising under its treaties and agreements, and the illegal disbursement of respondent's funds made in violation of various acts of Congress governing their disbursement.

The case is concisely stated in the opinion of the court below as follows (Rec. 16):

> "* * * The claim is one of accounting, except as to one item, and in the main is similar to the claim presented in The Creek Nation v. United States, 78 C. Cls. 474.
>
> * * * * * * *
>
> "The plaintiff's claim in the aggregate amounts to $1,746,013.23, and consists of items falling generally within two classes:
>
> 1. Items as to which it is alleged that the United States failed to make payments in the amounts and in the manner provided by its treaties and agreements with the Seminole Nation.
>
> 2. Items as to which it is alleged payments were made by the Secretary of the Interior out of Seminole trust funds without authority of law."

In accordance with the above classification the items of the claim now in dispute may be outlined as follows:

Class 1.

Items 1, 3 and 4 (Findings III, IV, VI and VII (R. 10-12, 16-20), involve the obligations of the United States due to

the Seminole Nation under Articles VIII and IX of the Seminole treaty of August 7, 1856, 11 Stat. 699, 702.

Items 5 and 7 (Findings IX and XI) (R. 12-14, 20-22), involve the obligations of the United States due to the Seminole Nation under Articles III and VI of the Seminole treaty of March 21, 1866, 14 Stat. 755.

Class 2.

Item 8 (Finding XII) (R. 14, 23-26), involves the illegal disbursement of Seminole moneys under Section 19 of the Act of Congress, approved June 28, 1898, c. 517, 30 Stat. 495, 502 (The Curtis Act).

Item 9 (Finding XIII) (R. 14, 26-27), involves the illegal disbursement of the principal of the "Seminole School Fund" established under the terms of the original Seminole Agreement, ratified by Act of Congress of July 1, 1898, c. 542, 30 Stat. 567, 568.

Items 11, 12, and 13 (Findings XIV, XV, and XVI) of recovery are not questioned by petitioner.

All of the material facts, and all of the relevant portions of the treaties and acts involved, appear in the special findings of fact of the court below (Rec. 9-29).

The Main Question.

The main question in this case is: whether the executive officers of the United States, in disbursing Seminole moneys, must follow the express mandates of the legislative branch as contained in the provisions of treaties, agreements and Acts of Congress, or whether the executive officers may disregard these legislative mandates, and disburse these moneys in their discretion. Thus the independence of the coordinate branches of our Government is brought into issue—the petitioner squarely presents the issue of the superiority of the executive over the legislative branch—and to hold with petitioner the court would have to assume that the executive was superior; that the executive, instead of

taking as a basis for its acts, the clear mandates of the legislative when rendered within its sphere, could exalt itself over the legislative, and could ignore the clear mandates of the legislative rendered within its sphere.

In the case of the *Creek Nation* v. *United States*, 78 C. Cls. 474, a case similar in principle to the one at bar, the court held that the executive officers must follow the express mandates of the legislative branch, stating as follows (*supra*, p. 491):

> "* * * To hold that the Secretary of the Interior had the legal right to expend such funds, in the face of positive prohibition against their expenditure without specific appropriation would be equivalent to holding that the Secretary of the Interior, not Congress, had full administrative control and power over the property of the plaintiff tribe. * * *"

The principles of law applied by lower court.

The law governing items of the claim under Class 1 above stated is set out by the court as follows (Rec. 23):

> "In determining the plaintiff's right to recover as to these items, we have applied the rule that an Indian tribe is entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, unless Congress by subsequent legislation provides that payment be otherwise made, and that the United States is liable to the tribe for the balance of any moneys not so disbursed and expended."

The law governing items of the claim under Class 2 above stated is set out by the court as follows (Rec. 23):

> "We now come to the consideration of the items of the claim where it is alleged disbursements of Seminole trust funds were made by the Secretary of the Interior without authority of law. In the consideration of these items the rule stated in The Creek Nation v. United States, supra, will be applied:

> 'That Congress has plenary power over the administration of Indian affairs is well settled. Cherokee Nation v. Georgia, 5 Pet. 1; Cherokee Nation v. Hitchcock, 187 U. S. 294; Lone Wolf v. Hitchcock, 187 U. S. 553. The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined.' "

The above principles of law cover this whole case and are applied to all items of the claim.

Jurisdictional Question Raised by Respondent.

In our brief opposing the petition for writ of certiorari, we took the position that the United States had made application to this court after the expiration of the 90 days allowed by Section 8 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 940 (U. S. C., Title 28, Sec. 350), and cited *Rust Land & Lumber Co.* v. *Jackson*, 250 U. S. 71, 76; *United States* v. *Lippmann, Spier & Hahn*, 260 U. S. 739; *Hooper* v. *United States*, 274 U. S. 743; that defendant's second motion for new trial was filed under Section 1088, Revised Statutes, Judicial Code, Sec. 175 (U. S. C., Title 28, Sec. 282), and that the mere filing of such a motion would not enlarge the time for filing an application for certiorari but that the motion and the application are independent matters and may exist together, *United States* v. *Ayres*, 9 Wall. 608; *Ex parte Russell*, 13 Wall. 664; *Ex parte United States*, 16 Wall. 699; and that a decision of the Court of Claims on such a motion was final. *Young* v. *United States*, 95 U. S. 641.

The petitioner filed a reply memorandum denying that its motion was filed under Section 1088, claiming that the motion was a broad one. The respondent was unable to file a reply to this memorandum before the court acted upon the

petition. In its present brief, the United States restates the substance of its reply memorandum, which we will briefly comment upon.

The only leave asked for and granted to petitioner by the Court of Claims was that it file the second motion for a new trial "pursuant to R. S., Sec. 1088, Judicial Code, Sec. 175, U. S. C., Title 28, Sec. 282." (Rec. 30.) *No leave was granted to petitioner to file any other kind of motion.*

The petitioner states that "Moreover, the attached motion, which spoke for itself, made no reference to R. S. Sec. 1088 and was a general motion." (Br. p. 2.) To show that this motion was actually filed under Section 1088, and that it matters not how the motion was worded, we need only to quote from petitioner's brief in support of this motion, as follows:

> "* * * Since this error goes to the jurisdiction of this court, it can be raised at any stage of the proceedings. Matson Navigation Co. v. United States, 284 U. S. 352, 359; cf. United States v. Martinez, 195 U. S. 469, and is an error which does such wrong and injustice to the United States as to fall within the provisions of R. S. Sec. 1088, Judicial Code Sec. 175, U. S. C., Title 28, Sec. 282. McCollum, Adm'r v. United States and the Rogue River Indians, 33 Ct. Cls. 469, 474; cf. Sanderson v. United States, 210 U. S. 168. As this court stated in the McCollum case at page 474—
>
> 'A motion for a new trial, *however worded*, which shows a want of jurisdiction in the court to render the judgment must, if filed after the term at which the judgment was rendered and within two years from the date thereof, be treated as a motion under section 1088, as any judgment rendered without jurisdiction necessarily imposes a wrong upon the judgment defendants.'" (Italics ours.)

We were aware of the decision in the case of the *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, cited by petitioner, but it is suggested that this case is not applicable to a motion for new trial under said Section 1088—an extraordinary mo-

tion, and from a decision thereon, no review is provided. In *Young* v. *United States*, 95 U. S. 641, 643, this court stated:

> "* * * Over its (Court of Claims) decision within that jurisdiction we have no control, for the statute has not provided an appeal. The new trial is to be granted if the evidence submitted, whether cumulative or otherwise, is sufficient to satisfy that court 'that fraud, wrong, or injustice had been done to the United States.' * * *. We are all of the opinion that the decision of the Court of Claims upon a motion by the United States within the prescribed jurisdiction, is conclusive and not subject to review."

In *Ex parte Russell*, 13 Wall. 664, 669, in construing Section 1088 this court has said:

> "Neither the existence nor the determination of the appeal interferes with the right, on the part of the Government, to apply for a new trial; and, of course, the mandate from this court cannot affect it."

It is respectfully suggested that if the court retains jurisdiction it would be holding, in effect, that there can be a review of the decision of the Court of Claims under Section 1088, for it is from the date of the overruling of the Government's motion under this section that petitioner bases its right to have this case reviewed.

ARGUMENT.

QUESTIONS RAISED BY PETITIONER.

We will answer the questions raised by petitioner in the order in which they appear.

Petitioner's Contention I.

The petitioner contends that (Pet. Br. 23):

> "The jurisdiction of the Court of Claims was limited to claims of the Seminole Nation arising from payments

made, after July 1, 1898, by the Government, from trust funds, created under Seminole treaties or agreements, to persons other than the Seminole tribal treasurer.

This question arises out of the pleadings filed by plaintiff in the court below, and was raised by petitioner for the first time when it became the substance of defendant's motion for new trial under Section 1088, Rev. Stat. (see *supra*, pages 6-8).

The original petition was filed on February 24, 1930, which was within the limitation fixed by the special jurisdictional act as amended (Rec. 10). After the accounting report requested by the original petition was examined, the amended petition, with leave of court first obtained, was filed on September 19, 1934 (Rec. 3). The case was tried upon this amended petition, and as the lower court states (Rec. 16) "The jurisdiction of the court to hear and determine the issues presented in the amended petition, filed on September 19, 1934, is not questioned by the defendant." In its first motion for new trial the question was not raised by defendant. After the many years the original petition was before the lower court, and after all the expense entailed in the preparation of the case and the submission of the accounting report prayed for therein had been incurred, and after this petition had been supplanted by the amended petition, defendant filed in the court below a motion under Section 1088 Revised Statutes, which was in effect a belated demurrer to the original petition. It is respectfully submitted that under the above circumstances the petitioner's present contention is most unreasonable, and that it is now too late to raise any question of pleading which has been waived for the past six years.

The petitioner's contention overlooks the fact that the jurisdictional act permitted the Seminole Nation, for the first time in its history, to adjudicate "*any and all legal and equitable claims*" arising under or growing out of its treaties and agreements, and acts of Congress relating to

Indian Affairs; that the right of the ward to demand an accounting of its guardian is an equitable right support of which needs no citation; and that in a petition requesting a general accounting, wherein it is alleged that all of the facts are within the sole knowledge of defendant, the guardian, allegations need not be specific, and may be general.

Let us review the whole matter for the court.

The cause of action, preserved in the original petition, was the *illegal disbursement* of plaintiff's treaty and trust funds arising under the *various* treaties and agreements between the Seminole Nation and the United States, before the Curtis Act; and the *illegal disbursement* of said funds in violation of treaties, agreements, and other various acts of Congress governing these disbursements, after the Curtis Act. The petition was, of necessity, couched in general terms as the specific facts concerning the claim were within the sole knowledge of the defendant. The petition prayed that as soon as the general accounting report was filed with the court, plaintiff be permitted to amend to conform to the proof, "and that plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law."

There was reason for our adopting this course. This case is similar in principle to the Creek accounting case, 78 C. Cls. 474, in which we were attorneys for the Creek Nation. In an endeavor to get the Creek case to trial speedily, we attempted to work out the specific claims presented in the petition by ourselves making an audit of the books of defendant, and we employed accountants for this purpose. The defendant's officers had promised to "check" this work, thereby saving time that would be required for another general audit by the Government. However, instead of "checking" the work of our accountants, defendant's officers made a new and complete audit of all moneys disbursed by the United States under all of the Creek treaties (beginning in 1790), agreements, and acts of Congress dealing with their affairs, and refused to proceed with the case

until this report was completed. After many years of delay, this report was filed in the case. To this evidence of defendant the plaintiff was forced to conform, and the petition was so amended in the Creek case as was done in this case.

With our experience in the Creek case before us, we saw the utter futility of our former course, and the needless expense to which the Seminole Nation might be put, and in our petition in the Seminole case we prayed for a general accounting with the right to amend to conform to the facts disclosed in the accounting report.

The petitioner contends (Pet. Br. 26) that the jurisdictional act was not intended to authorize the Seminoles to request a general accounting.*

Section 1 of the Act of May 20, 1924, c. 162, 43 Stat. 133, provides:

> "That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."

That Congress intended to authorize a general accounting is evidenced by the following statement of Congressman W. W. Hastings, in the debate on this bill in the House of Representatives (House Bill 5799, Congressional Record, Vol. 65, 68th Cong., 1 Sess., page 3503, date March 3, 1924):

> "Mr. Hastings. Mr. Speaker, the Seminole Tribe of Indians is one of the Five Civilized Tribes of Okla-

*In all of these Indian cases it has been the policy of the Government to make a general accounting of all moneys disbursed for each tribe, and there is nothing unusual in the request for accounting made herein by respondent.

> homa. This tribe is about to be emancipated; that is, it is about to come out from under the supervision of the Federal Government. Their lands have been allotted and their moneys divided among the members of the tribe. Since about the year 1898 the Government of the United States has had complete supervision over and disbursement of the funds of the tribe, and inasmuch as this tribe is about to be emancipated, the members want an opportunity to make an examination into the handling of their affairs, and if there are any objections they want an opportunity to go into court, exactly like a minor on becoming of age. *The minor has the right to inspect a guardian's report, and this tribe wants to have the opportunity to except to any item or transaction of the Government.* We should not object to permitting these Indians going into our own courts to present their claims." (Italics ours.)

The Report of the House Indian Committee on this bill, dated January 31, 1924 (Cong. Ser. 8226, H. Rep. 134, 68 Cong., 1 Sess.), states as follows:

> "The bill has for its purpose a *final and complete settlement of all difference and accounts between the Government and the Seminole Indians by judicial determination* with the right of appeal to the Supreme Court of the United States. The affairs of the Seminole Tribe are about wound up, all of their lands have been allotted and their tribal funds disbursed." (Italics ours.)

This report also sets forth the report of Hubert Work, Secretary of the Interior, dated January 30, 1924, to the Chairman of the Committee on Indian Affairs of the House, favorably recommending the passage of this legislation. This letter states in part as follows:

> "*No specific claim of the Seminole Nation or Tribe against the Government has been brought to my attention.* However, as the tribal affairs of the Seminole Nation or Tribe are nearing their close, and as the affairs covered a period of years and involved the disbursement of considerable sums of money, *it may be there should be an accounting and that where there are differences as to the accounting or as to the interpreta-*

tion of the statutes, the Seminole Tribe should be permitted to go to the Court of Claims to have the matters in dispute adjudicated. If Congress should conclude that there is sufficient reason to permit the Seminole Nation or Tribe to have these matters referred to the Court of Claims, no objection is seen to that course being pursued." (Italics ours.)

The above statements show that Congress intended that the Seminole Nation should have an accounting so that there might be a "final and complete settlement of all difference and accounts between the Government and the Seminole Indians by judicial determination," and the language of this jurisdictional act carries out this intent by expressly waiving the statute of limitations, and providing that the Seminole Nation may adjudicate "any and all legal and equitable claims." The equitable right of the ward to demand an accounting of its guardian is too well established for argument, and it is submitted that what was done in this case was clearly within the intent of Congress in passing the jurisdictional act of 1924.

Petitioner suggests that such a course would be a departure from the usual practice in the Court of Claims (Pet. Br. 26). On the contrary, in this course we were supported by the Rules of that court. Rule 12 then in force (now Rule 14, Revised Rules), provided that:

"12. When the plaintiff cannot state his case with the requisite particularity without an examination of papers in one of the executive departments and has been unable to obtain a sufficient examination of such papers on application he may file a petition stating his claims, as far as is in his power, and specifying, as definitely as he can, the papers he requires, and thereafter may file a motion for a call upon the proper department for such information or papers as may be deemed necessary, and when the same are furnished the petition may be amended and take the place of the original petition."

Petitioner, in an attempt to narrow the construction of our original petition, contends that the lower court erred (1) in granting recovery for illegal disbursements of respondent's treaty funds before July 1, 1898, because the original petition sought recovery only for illegal disbursements after that date, and (2) that recovery for illegal disbursements of the income of certain trust funds only was sought therein.

1.

To uphold the first point raised by petitioner Paragraphs II and VII (Rec. 1, 2) of the original petition would have to be disregarded altogether. The general allegations in these paragraphs, coupled with those in Paragraph VIII, show clearly that plaintiff sought recovery for illegal disbursements under "*various* treaties and agreements between said plaintiff and defendant", before July 1, 1898, which is the first period covered by the claim. Paragraph II alleges "That at all times mentioned herein, and for many years prior thereto," plaintiff was the owner of large trust funds, held in trust by the defendant for its use and benefit, and that there existed *various* treaties and agreements between plaintiff and defendant whereby said trust funds were to be managed and invested by defendant, and the interest thereon paid over to the National Treasurer of plaintiff.

The use of the word "treaties" shows that our claim antedates July 1, 1898, for no more treaties could be made with an Indian tribe after the passage of the Act of March 3, 1871, c. 120, 16 Stat. 544, 566 (Rev. Stat., Sec. 2079). The use of this broad term clearly shows that our claim antedates the year 1898, and reaches back of 1871, and is so all-inclusive that it would embody any treaty between the plaintiff and the United States prior to the passage of the Act of 1871. After the Act of March 3, 1871, agreements only could be made with an Indian tribe. We used the broad term "agreements," signifying that the claim

includes any agreements made after the Act of March 3, 1871.

The allegation in Paragraph II that the interest on the trust funds was to be paid to the National Treasurer of plaintiff also clearly shows that the claim antedates July 1, 1898, for this method of paying certain of this income has its inception in the Act of April 15, 1874, c. 97, 18 Stat. 29.

All of this the petitioner admits in its brief wherein it states that Paragraph II "states the origin and long duration of the plaintiff's right." (Pet. Br. 31)

Paragraph VII also clearly shows that this claim antedates July 1, 1898. This allegation is as follows:

> "That at all times mentioned herein a certain act of Congress now known as Section 2097, Revised Statutes of the United States, was in full force and effect. That said section is as follows:
>
> 'No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law'" (Rec. 2).

Section 2097, Revised Statutes, was in full force and effect since its passage on July 26, 1866, c. 266, 14 Stat. 255, 280, and applies up to the time of the Curtis Act, when a new order of affairs was established. This allegation shows clearly that our claim for illegal disbursements antedates July 1, 1898.

Let us impress upon the court that all moneys claimed before July 1, 1898, for which the lower court permitted recovery, had been appropriated by Congress to fulfill the treaties with plaintiff (Rec. 11-13), but were not disbursed by defendant in the manner so provided in said treaties. Therefore, these illegal disbursements were also made in violation of said Section 2097, and the allegations in Para-

graph VII would cover most of the items of illegal disbursement before July 1, 1898, upon which recovery was had in the amended petition.*

It is submitted that the contention of petitioner that the claim in the original petition does not antedate July 1, 1898, is without merit.

2.

The second point raised by petitioner is equally without merit. That petitioner is guardian of respondent, the Seminole Nation, is well settled, and any moneys due under treaties and agreements which were to have been disbursed by petitioner for the benefit of respondent would be trust funds in the general sense, and the general allegations of the original petition clearly imply that trust funds were not used in the narrow sense as suggested by petitioner, but in the general sense. Then, too, from the broad language of Section 2097, above quoted, the clear inference is that the claim includes all treaty funds, whether trust funds in a narrow sense, or general treaty funds.

Second period of respondent's claim.

The second period of our claim begins with the Curtis Act, approved on June 28, 1898, c. 517, 30 Stat. 495, for under this act the United States assumed full administrative control of the affairs of the Five Civilized Tribes. In the light of the knowledge then available to us, and guided by our experience in the Creek case, *supra,* we drafted Paragraphs III to VI, inclusive, of the original petition. These paragraphs allege violations of the terms of treaties and agreements, and other acts of Congress, beginning with July 1, 1898 (the beginning of the fiscal year after the Curtis Act became effective), as the result of which defendant illegally disbursed plaintiff's funds. Violations of Sec-

*Section 2097 is considered by the lower court in its opinion with reference to Item 3 (Rec. 20).

tion 19 of the Curtis Act, and the illegal disbursement of the principal of the permanent "Seminole School Fund" come within this period.

Paragraph VI of the original petition provides:

> "That from July 1st, 1898, until the present time, defendant, in violation of its duty as trustee of the funds of plaintiff, in violation of the rights of plaintiff under its various treaties and agreements with defendant, and without authority of Congress, has spent large sums of the trust funds of plaintiff" (Rec. 2).

Petitioner contends that paragraphs III to VI of our original petition are not broad enough to cover the item of the claim for illegal disbursements under Section 19 of the Curtis Act (Amended Petition, Rec. 6). Paragraph IV of the original petition specifically sets up Section 19, and Paragraph V alleges that after the Curtis Act Congress passed various acts giving authority for the expenditure of plaintiff's funds, but that no one of these acts gave authority for the expenditure of the funds claimed as being illegally disbursed. Then Paragraph VI alleges illegal disbursements in violation of treaties and agreements, carrying over into this period, and further alleges other illegal disbursements made "*without authority of Congress*". As the illegal disbursements claimed in violation of Section 19 were made after July 1, 1898, *without authority of Congress*, as alleged in Paragraph VI of our original petition, it is obvious that this item of our claim is amply covered by the general allegations of our original petition.

Then, too, a mere reference to petitioner's contentions under the item of claim under Section 19, shows that petitioner relies upon the Seminole Agreement, ratified by Congress on July 1, 1898, to defeat this claim (Pet. Br. 50). The respondent contends that the Seminole Agreement does not authorize these payments to the tribal officers. Thus the Seminole Agreement is squarely brought into issue; making this claim similar in principle to the claim for il-

legal disbursements of the principal of the Seminole School Fund, which petitioner admits comes within the allegations of Paragraphs IV, V, and VI of the original petition. (Pet. Br. 38, footnote 13.) In other words, if petitioner admits that one of these items of the claim comes within the allegations of the original petition, surely it should admit that the other item is covered by the original petition, as both of these items bring into issue the terms of same law—the Seminole Agreement.

The petitioner further contends as to our claim under Section 19 that the allegations in Paragraphs II and III of our original petition show an inconsistency with the item of claim set forth in Paragraph VIII of the amended petition (Rec. 6). The petitioner works out this inconsistency by comparing the allegation in Paragraph II of the original petition, alluding to payments of interest to plaintiff's national treasurer, with the allegation in Paragraph III that after the Curtis Act defendant refused to make further payments to plaintiff's national treasurer. These allegations were incidental to the claim and were merely intended to be, and actually were, descriptive of the two separate periods or "eras" of the claim—before and after the Curtis Act. No claim was made in Paragraph II of our original petition, or in the amended petition, for moneys lawfully paid to the tribal treasurer before the Curtis Act, nor was judgment given for any such payment. No claim was made for moneys which the petitioner refused to turn over to plaintiff's treasurer, nor was judgment given on any such claim after the Curtis Act.*

Therefore, these allegations being merely incidental to the cause of action—illegal disbursements of plaintiff's funds—and being merely descriptive of the two periods of

*The truth of the allegation that defendant refused to turn moneys over to plaintiff's treasurer after the Curtis Act, under the Van Devanter opinion, is well known to the court. However, defendant later reversed its position, and thus violated the law as set forth in Section 19 of the Curtis Act. As we have heretofore pointed out, this violation is covered by the allegations in Paragraphs III to VI of our original petition.

the claim, would furnish no basis for petitioner's present contention that the claim for illegal disbursements under Section 19, as set forth in the amended petition, is foreign to the general claim for said illegal disbursements alleged in Paragraphs III to VI of the original petition.

The petitioner further contends that as the $1,500,000 trust fund—involved in the claim under Section 19 of the Curtis Act—was established by the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, a statute, there is no allegation in the original petition covering illegal payments of the interest on this particular fund made to the tribal treasurer after July 1, 1898. It is difficult to follow this contention, for we do not claim as illegal disbursements any interest payments under the Act of 1889 made before the terms of this Act were modified by Section 19 of the Curtis Act. The respondent claims that after July 1, 1898, this interest was illegally disbursed in violation of Section 19 of the Curtis Act. Let us repeat, no claim was made by respondent for any of these interest payments *before* the passage of the Curtis Act, because these payments were then lawfully made to the Seminole tribal treasurer in accordance with the provisions of the Act of 1889.

However, Section 19 of the Curtis Act repealed that part of the Act of 1889 permitting payments to the Seminole tribal treasurer, and therefore changed the manner of disbursement of the interest payments arising from this fund. Section 19 provided that thereafter *none* of these interest payments shall be made to the tribal treasurer for disbursement. As payments of this interest continued to be made to the tribal treasurer after July 1, 1898, in violation of Section 19, and were not thereafter authorized by Act of Congress, these illegal disbursements were covered by the general allegations in Paragraphs III to VI, inclusive, of the original petition.

The original petition further alleges in Paragraph VIII:

> "That the defendant has thus spent, in violation of law, a large amount of the trust funds of plaintiff.

That the exact amount of such expenditure will be shown by the books and records of defendant, and that such knowledge is in the possession of defendant, and not of plaintiff.

"Wherefore, plaintiff prays that defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds during said period, the purposes for and dates when such expenditures were made, and the authority of law, if any, which authorized defendant to make such expenditures; that, if necessary thereafter, plaintiff be permitted to amend this petition, and that plaintiff have judgment against the defendant in such sum or sums as appear to this court to be expended without authority of law, with interest at six per centum per annum from the date of the expenditure of the several items constituting said sum" (Rec. 2, 3).

After having set up that plaintiff was owner of trust funds under its *various* treaties and agreements which *were to* have been managed by defendant and the interest thereon paid to plaintiff's treasurer, and after having quoted Section 2097 Revised Statutes, the Curtis Act (Section 19 specifically), and after alleging that after the Curtis Act Congress passed various acts giving authority for the expenditure of plaintiff's funds, but that no one of these acts gave authority for the expenditure of the amounts complained of, plaintiff, in addition to charging specifically the defendant with illegal disbursements after July 1, 1898 (Par. VI), then charges in Paragraph VIII "That the defendant has thus spent, *in violation of law*, a large amount of the trust funds of plaintiff." It is respectfully submitted that this general charge is sufficient to inform defendant of the nature of all violations—either before or after the Curtis Act—for which recovery was sought in the original petition.

Petitioner contends that the language of the prayer, above quoted, is so narrow that it would not include in the request for a general accounting any items before July 1, 1898, and that this is evident from the language "that

defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds during said period." This implication from the broad language used is not justified. Clearly we intended "said period" to refer to the whole period of the claim, and the judicial interpretation of the word "said" supports our intention.

In Words and Phrases, Vol. 7, page 6286, this word is interpreted as follows:

> "The word 'said' is often used as a word of reference to what has been already spoken of or specified; and if there is a question as to which of the antecedent things or propositions specified is referred to, it is generally held to refer to the last of such antecedent propositions or things. Hinrichsen v. Hinrichsen, 50 N. E. 135, 136, 172 Ill. 462."

And again in Words and Phrases, 3rd. Series, p. 902, it is stated:

> "'Said' means aforesaid or before mentioned and refers to what has been already spoken of or specified, and refers to the last one of antecedent propositions or things in case of any question." Le Flore v. Handlin, 240 S. W. 712, 715; 153 Ark. 421.

A reference to the original petition shows that Paragraph VII is the last antecedent proposition, and in that paragraph the period stated was "At all times mentioned herein," which refers back to any and all periods mentioned in the preceding paragraphs, especially paragraphs VI and II.

Thus we see that the word "said" in connection with "period" would not jump over Paragraph VII of the original petition, as defendant contends, but would refer specifically to the period mentioned in this paragraph, which is "At all times mentioned herein." This period would relate back to any of the previous periods mentioned in the petition.

It is apparent to the court that the general accounting requested was the essence of the petition. As was said in *Green* v. *Brooks*, 22 P. 849, 851:

> "The very object of an accounting may be, and frequently is, to ascertain how much has been realized and expended, so as to determine whether the cestui que trust is entitled to payment."

The rules of pleading are liberal in cases wherein a fiduciary relationship exists, and it is well settled that in a petition for a general accounting:

> "When existence of the fiduciary relationship and receipt of property thereunder by defendant are alleged, and nothing is stated barring the right of relief, the complaint is sufficient." 65 C. J. 902.

And again:

> "Where matters essential to the determination of claims by complainant in a bill for an accounting are charged to rest in the knowledge of defendant, or must of necessity be within his knowledge, and are consequently the subject of a part of the discovery sought by the bill, precise allegations thereof are not required." 1 C. J. 635; State v. Ill. Cent. R. Co., 246 Ill. 188, 92 N. E. 814, 835.

The petitioner makes the further contention that we are required to plead the particular recovery sought, and that the court is without authority to grant any other recovery. This contention has no support in law.

In the case of *Electric Boat Co.* v. *United States*, 66 C. Cls. 333, 377, in commenting upon the rules of pleading in the Court of Claims, Mr. Chief Justice Booth states:

> "* * * The judgment awarded is not the judgment sought in the petition, plaintiff contending for the amount of increases plus a reasonable profit. The court, however, is authorized under our forms of pleading to award a judgment in accord with the facts stated and proven, notwithstanding the absence of a count in the pleadings for the particular recovery.

Wood et al. v. United States, 49 C. Cls. 119; Clark v. United States, 95 U. S. 539."

And in *Clark* v. *United States,* 95 U. S. 539, 543, this court stated as follows:

> "If objected that the petition contains no count upon an implied contract for quantum meruit, it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived."

From the above holdings it is obvious that if a petition states the substance of the right of recovery, the court, under the rules of pleading, may grant the recovery it considers proper to do justice to the plaintiff.

Even if the original petition had imperfectly stated the cause of action, it is well settled that:

> "If a complaint not demurred to, sets out a cause of action, however imperfectly, it will withstand objection first made after judgment." Vicksburg S. & P. Ry. Co. v. Anderson-Tully Co., 261 Fed. 741, 744, 745, affirmed 256 U. S. 408.

Viewing the original petition in the light of the foregoing discussion and the above quoted decisions, it is respectfully submitted that the general allegations are entirely sufficient to sustain the specific items of the claim as set forth in the amended petition and upon which the court based its judgment; and that it is now too late for petitioner to complain of these general allegations of the original petition.

Development of original cause of action.

The petitioner states that the amended petition was filed four years after the jurisdiction of the Court of Claims had lapsed (Pet. Br. 32). This delay in amending our pe-

tition cannot be attributed to plaintiff below, for defendant's officers took four years in which to prepare and file the accounting requested in the original petition. It is evident to the court that no progress could be made in the trial of the case until this report was submitted by defendant.

In accordance with the request in the original petition, the General Accounting Office compiled its report, showing disbursements under *every* treaty and agreement between the Seminole Nation and the United States, and under *all* acts of Congress governing these disbursements. Surely defendant's accounting officers were not deceived as to the meaning and intent of our original petition. This accounting report was filed by defendant in the court below on September 9, 1934, and our amended petition was based upon this report.

After an examination of this accounting report, plaintiff below prepared and filed the amended petition, with leave of court first obtained (Rec. 3). Defendant made no objection to this petition when it was filed, and made no objection to it at the trial, and the case was heard upon it (Rec. 8).

In the amended petition the *original cause of action*—the illegal disbursement of plaintiff's funds before and after the Curtis Act—*remains the same.* This petition merely *particularizes the items* of the general claim in the original petition. Thus in amending our petition we "*narrowed*" the broad allegations of the original petition to the specific items of illegal disbursement set forth in the amended petition. In other words, we have merely pleaded the facts concerning our original claim, as developed from the evidence submitted by defendant in the accounting report, which was prayed for in the original petition. The petitioner cannot properly say that we have gone outside of this accounting report to set up items of our claim in the amended petition, and it must be conceded that this was not done. Nor can it be said that petitioner was sur-

prised, or deprived of any defense, or put to any disadvantage whatever, because of the amended petition, for it was filed before the trial of the case.

We believe that what has been done is covered by the rule as stated in *Buck* v. *United States,* 25 C. Cls. 120, 122, wherein the amendment occurred after the statutory period had run. The court said:

> "The original petition embraced, by general allegation, the kind and quality of services contained in the amended petition, and the amended petition in addition contained a charge of $6.00 rendered in 1886, after the passage of the Act of August 4, 1886. Amendments are largely in the discretion of the court, and are always proper as against the statute of limitations, when no new cause of action is introduced and the amendment is confined to a mere development of the original cause of action (Cape Ann Granite Company v. The United States, 20 C. Cls. R. 1)."

See also the cases of *Hardin* v. *Boyd,* 113 U. S. 756, 761-765; *Richmond* v. *Irons,* 121 U. S. 27, 43-47; *Texas and Pacific Ry. Co.* v. *Cox,* 145 U. S. 593, 603.

The rules of pleading in the Court of Claims are liberal. In *The Fed. Mfg. & Printing Co.* v. *United States,* 41 C. Cls. 318, 321, 322, this court said:

> "Section 954 of the Revised Statutes provides that any court of the United States may at any time permit either of the parties to amend any defect in process or pleadings upon such conditions as it shall, in its discretion and by its rules, prescribe. This statute is in accord with the spirit of modern jurisprudence. The discretion of the courts ought to be exercised with great liberality in the allowance of amendments and will be in furtherance of justice so far as this court is concerned, except when the failure to observe the restraining rules of the common law will operate to unjustly prejudice the substantial right of the other party to the proceeding, and except in those cases where the amendment seems superflous."

The lower court in the use of its discretion permitted the amended petition to be filed in this case, in accordance with its rules and without objection by defendant below, and it therefore took the place of the original petition.

It is also well settled that the allowance of amendments is within the discretion of the lower court, and that its action thereon is not reviewable by this court. *Chirac* v. *Reinicker*, 11 Wheat. 280, 302; *Stevens's Admr.* v. *Nichols*, 157 U. S. 370, 371; *Howe* v. *Haterius*, 66 Fed. (2) 835, 837. And in the case of the *Union Pacific Ry. Co.* v. *United States*, 116 U. S. 402, this court refused certiorari, to the Court of Claims to send up the original petition, when an amended petition was filed and the case heard upon it.

For the reasons above set forth it is respectfully submitted that the lower court did not err in permitting the amended petition to be filed, and that the original petition filed herein would cover by general allegation all of the items upon which judgment was had in the lower court.

Petitioner's Contention II.

The petitioner contends (Pet. Br. 39) that:

> The Government is not liable to the Seminoles for the $864,702.58 which it paid out of Seminole Trust Funds to the tribal treasurer from the fiscal year 1899 through the first half of the fiscal year 1907.

The lower court held that the petitioner was liable for the failure of the Secretary of the Interior to follow the plain mandate of Congress, as contained in Section 19 of the Curtis Act, which resulted in the loss to the Seminole Nation of its yearly income. The rule of law applied by the lower court is stated as follows (Rec. 23):

> "That Congress has plenary power over the administration of Indian affairs is well settled. Cherokee Nation v. Georgia, 5 Pet. 1; Cherokee Nation v. Hitchcock, 187 U. S. 294; Lone Wolf v. Hitchcock, 187 U. S. 553. The Secretary of the Interior has only such au-

> thority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined."

Section 19 of the Curtis Act, approved June 28, 1898, 30 Stat. 495, 502, provides as follows:

> "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

The petitioner divides its contention into three parts, which we will follow in our reply.

Petitioner's Contention A.

The petitioner contends (Pet. Br. 40) that:

> Section 19 of the Curtis Act does not apply to the type of trusts involved in Item 8.

We cannot agree with this contention because (1) it attempts to narrow the broad language of the *first part* of Section 19 and to limit its operation to per capita payments only; (2) it overlooks the holding to the contrary in *The Creek Nation* v. *United States*, 78 C. Cls. 474 (a final decision); (3) it overlooks the intent of Congress and the object behind the passage of Section 19; and (4) it overlooks the fact that if Section 19 did not apply to this trust fund income it could have no application at all, as this was the only source of income of the Seminole Nation during the period of this claim.

It is evident to the court that Section 19 provides separately for per capita payments in the *second part* of this provision, this authorization being separated from the first part of this section by a semi-colon. The broad language of the *first part* of this section provides:

> "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him".

In the Creek case, *supra*, the court passed upon the precise question now before us. In this case petitioner took a position *directly opposite to the one for which it now contends*, and therein strongly and successfully urged that Section 19 of the Curtis Act was in full force and effect for the period from 1898 to 1912, inclusive, and that under it the Secretary of the Interior had *broad powers*, including implied authority to disburse Creek funds for purposes not specifically authorized by Congress. The court, in this case, held (78 C. Cls. 474, 487-488, 489-490):

> "The authority to disburse the tribal funds and all moneys coming to the tribe under the provisions of the three acts was lodged solely in the Secretary of the Interior".
>
> "Section 19 of the Curtis Act changed only the manner in which the Creek tribal funds were to be disbursed. Neither that section nor any other provision of the act defines or limits in any way the purposes for which the tribal funds might be expended. These funds were no longer paid into the Creek National Treasury by the United States for the purpose of disbursement by the tribal authorities, but were retained in the Treasury of the United States to the credit of the tribe, and were disbursed by the Secretary of the Interior. * * * * Consequently, we think that when Congress, by the provisions of Section 19 of the Curtis Act, took away from the Creek tribal authorities the

> control which they had formerly exercised over the disbursement of their tribal funds and charged the Secretary of the Interior with the duty of disbursing the funds, without defining or limiting the purposes for which they might be expended, it by clear and necessary implication invested him with authority to disburse and expend the funds in such manner and for such purposes as would, in his judgment, satisfy the needs of the Creek Nation and promote the welfare and happiness of its citizens, subject to such limitations as Congress might subsequently impose".*

With the light of the decision of the court in the Creek case upon Section 19 before us, which breaks down the contention of petitioner that Section 19 is to be narrowly construed, let us examine the particular trusts, the incomes of which are involved in this question.

$50,000 TRUST FOR SUPPORT OF SCHOOLS.

The petitioner suggests that Section 19 would not affect what it terms the second trust, established by Article III of the Treaty of March 21, 1866, because its purpose was for education and not for per capita payments (Pet. Br. 45). Article III provides in part that:

> "the *United States agree to pay* in the following manner, to-wit: * * * seventy thousand dollars to remain in the United States Treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which *shall be paid annually and appropriated to the support of schools;* * * *" (Italics ours).**

We agree with petitioner when it states that "Congress never intended to alter or abandon its educational pro-

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*The court in the Creek case held that under Section 19 the Secretary had implied power to disburse moneys from tribal funds for the expenses of the tribal government. 78 C. Cls. 474, 494.

**The other $20,000 fund for the support of the Seminole Government is not involved in the claim.

gram'' (Pet. Br. 45). The petitioner's officers, however, did abandon this educational program *without authority of Congress.* As early as the period from 1867 to 1874, inclusive, petitioner failed to perform in full this treaty provision; and from 1875 to 1898, instead of paying this $2,500 yearly for education, this amount was paid to the Seminole treasurer, under a misapplication of the Act of April 15, 1874, c. 97, 18 Stat. 29, to this fund. We claim for this violation specifically in Item 5 (Rec. 20-22).

Then even after Section 19 was passed prohibiting such payments, the petitioner continued to violate this treaty provision, and also violated the plain prohibition in Section 19, by continuing to pay this school money over to the tribal treasurer.

It is significant also that both Article III of the Treaty of 1866, and Section 19 require this money to be paid *by the United States for the specific purposes,* and therefore the manner of disbursement in both provisions is the same.

THE $500,000 TRUST.

The trust fund of $500,000 was established under Article 8 of the Treaty of August 7, 1856, 11 Stat. 699. Article 8 provides in part as follows (Rec. 4):

> "* * * the *United States* do therefore agree and stipulate as follows, viz: * * * Also to invest for them the sum of two hundred and fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them per capita as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually *paid over to them per capita* as an annuity; but no portion of the principal thus invested, or the interest thereon annually due and payable, shall ever be taken

> to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws." (Italics ours.)

The Act of April 15, 1874, c. 97, 18 Stat. 29, changed the manner of disbursing this money and permitted the $25,000 yearly income to be paid into the treasury of the Seminole Nation (Rec. 19). No claim is made by respondent for payments lawfully made in accordance with the Act of April 15, 1874. This manner of payment continued until the passage of the Curtis Act, and was repealed by Section 19 of that Act. With the repeal of the Act of 1874, and in accordance with Section 19 and the Seminole agreement, the manner of payment provided in the Treaty of 1856 was revived; *i. e.*, that these payments be made by the *United States* instead of by the tribal officers.

Our claim arises when the Secretary of the Interior failed to comply with the law as laid down in Section 19, and continued to pay over these moneys to the tribal treasurer. It is significant to notice that this interest was originally authorized to be *paid by the United States* for per capita payments, and that the manner of disbursement provided in Article 8 of the Treaty of 1856, and Section 19, is the same.

THE $1,500,000 TRUST.

The $1,500,000 trust was established by Section 12 of the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, which provided in part as follows:

> "One million five hundred thousand dollars to remain in the Treasury of the United States to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semi-anually to the treasurer of said nation."*

*The $412,942.50 paid to the tribal officers under this Act (referred to by petitioner in its brief, page 48), was embezzled by the very officers (Brown, et al.) and the very same counsel (Samuel J. Crawford) who later fought to retain control of the Seminole funds. The Seminole Nation

Payments of the income on this trust fund to the tribal treasurer continued until this manner of payment was repealed by Section 19 of the Curtis Act. No claim is made by respondent for this income lawfully paid under the Act of 1889. Our claim arises out of the failure of the Secretary to follow Section 19 during the years 1899 to 1907, during which time the Secretary was required to disburse this income himself, in order to insure its proper receipt by the Seminole Nation.

We have reviewed these trust funds to show the court that the income from these funds was practically all of the moneys the Seminole Nation had before the Curtis Act was passed, and it was in the *handling of this income* by the tribal officers that complaints of gross fraud were made by the Dawes Commission, which resulted in the passage of Section 19 of the Curtis Act. If Section 19 did not apply to these moneys it could have no practical application at all, for there would be no moneys upon which it could operate, and Congress would be convicted of passing a useless provision of law.

The intent of Section 19 of the Curtis Act.

Let us pass on to the question of the intent of Congress in the passage of Section 19 of the Curtis Act. It is well settled that the spirit as well as the letter of a statute must be considered, and the intent, not the letter of the statute constitutes the law. *Durrousseau* v. *United States,* 6 Cranch 307, 313; *National Bank* v. *Matthews,* 98 U. S. 621, 626; *Pickett* v. *United States,* 216 U. S. 456, 461.

The petitioner suggests that the legislative history of Section 19 supports the contention that this section is to be so narrowly construed as to permit per capita payments

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has filed a separate suit to recover this item. The record of this transaction, and the investigation of it made by the Department of Justice, were filed in the record below in the case at bar, and tend to confirm the reports of the Dawes Commission setting forth the true conditions prevailing within the governments of the Five Civilized Tribes, which Congress sought to correct by the passage of Section 19 of the Curtis Act.

only (Pet. Br. 43). In answer to this suggestion we will refer the court to the decision of Assistant Comptroller Mitchell, dated August 30, 1898, 5 Comp. Dec. 93. In passing upon the identical points now raised by petitioner the Comptroller said (supra, page 96):

> "There does not seem to be room for serious doubt as to the meaning of the opening lines of section 19, of the act of June 28, 1898, supra. They import a plain, unqualified, and comprehensive prohibition of all payments by the United States to the tribal governments, or any officer thereof, on any account whatever for disbursement. Had the intent been simply to provide for payments to members of the tribes, either per capita or otherwise, by a disbursing officer of the United States, the prohibition found in the first three lines was unnecessary. * * *"*

To determine the intent of Congress it is important to review the conditions prevailing within the tribal governments of the Five Civilized Tribes out of which grew the necessity for the change brought about in the Curtis Act, under which the United States reassumed control of the administration of the affairs of these tribes.

Let us impress upon the court that the Curtis Act and the various agreements made with the various tribes were but a part of a single legislative scheme, worked out by the same officials, practically at the same time and for the same purpose—that of preventing the robbery of the private citizens of the tribe by the unscrupulous tribal officers, and the transferring of the administration of the tribal property and funds from these tribal officials to the United States Government.

The lower court, in its opinion (Rec. 24, 25) reviews the conditions prevailing within the tribal governments before

*This part of the Comptroller's decision was followed by the Secretary and by the Court of Claims in the Creek case, *supra*, when it held that Section 19 applied to Creek funds. The further holding in this decision, that Section 19 did not apply to the Creek funds after the Creek agreement became effective, was not followed by the Secretary or the Court in the Creek decision.

the Curtis Act, during which time the tribal income was disbursed by tribal officials, as follows:

> "Long before the passage of the Curtis Act, the utter inefficiency of the Indian tribal governments had been demonstrated and was universally recognized. It was also a matter of common knowledge throughout the Indian country that they were notoriously and incurably corrupt, and that every branch of the service was infested with favoritism, graft, and crookedness of every kind. The Dawes Commission, in one of its early reports to Congress (1894), in speaking of these tribal governments and the prevailing conditions existing under them, said:
>
> 'Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of the Territory of any kind that can be rendered profitable and available.
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> * * * * * * * * * *
>
> 'The large payments of moneys to the Indians of these tribes within the last few years have been attended by many and apparently well-authenticated complaints of fraud, and those making such payments, with others associated with them in the business, have, by unfair means and improper use of the advantages thus afforded them, acquired large fortunes, and in many instances private persons entitled to payments have received but little benefit therefrom. And worse still is the fact that the places of payments were thronged with evil characters of every possible caste, by whom the people were swindled, defrauded, robbed, and grossly debauched and demoralized. And in case of further payments

of money to them the Government should make such disbursements to the people directly, through one of its own officers.

* * * * * * * * *

'Justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain.'

"The Curtis Act and succeeding acts of Congress had for their purpose the creation of correct membership rolls of the Five Civilized Tribes, the allotment of their tribal lands in severalty, the sale of the surplus remaining lands after allotments had been made, the equalization of allotments, the per capita distribution of the remaining tribal funds, the final winding up of tribal affairs and the ultimate dissolution of the tribal governments. As a part of this comprehensive general program it was provided by section 19 of the Curtis Act:

'That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.'

"The undoubted purpose of this provision was to forever put an end to the intolerable conditions brought about by permitting the tribal governments to receive and disburse tribal moneys due them from the United States. It was to prevent unscrupulous tribal officers and corrupt designing persons associated with them from diverting to their own use and profit tribal funds, the common property of the tribe, and to insure that all members of the tribe would receive an equal share in the distribution of such funds. No

> more wholesome or humane provision was ever written into an Indian statute, and the Seminole Indians were entitled to its protection in the distribution of all tribal income due them from the United States. This protection, however, was not afforded them, and a continuation of the 'irreparable wrongs and outrages upon a helpless people' was made possible by payment thereafter of large sums of their tribal funds to the tribal treasurer."

As the lower court rightly holds, Section 19 was intended to correct the abuses prevailing in the manner of disbursing Seminole funds, and it was enacted to take away from the tribal officers the right they had exercised and abused under the Acts of April 15, 1874 and March 2, 1889, and to transfer that right to the Secretary in order to insure to the members of the Seminole Nation an equal share in the distribution of their tribal funds. That Congress can change the manner of disbursement under the Acts of 1874 and 1889, without the consent of the Seminoles, is too well established for further comment.

Section 19 was not repealed by the Seminole Agreement.

The Secretary of the Interior did not heed the plain mandate of Congress as set forth in Section 19, and continued to pay Seminole funds over to the tribal officers. If the Seminole Agreement, ratified by Congress on July 1, 1898, c. 542, 30 Stat. 567, repealed Section 19 then the Secretary was right in his course of action; but if there was no repeal of Section 19 by the Seminole Agreement, the Secretary's course was wrong.

The petitioner contends that Section 19 was repealed by the Seminole Agreement, and relies upon the decision of Assistant Comptroller Mitchell, dated August 23, 1898, which is printed as an appendix to petitioner's brief, page 23.

The opinion of the lower court clearly points out the error in this Comptroller's decision in that no provision of

any Seminole treaty provides that Seminole funds be paid to the tribal treasurer, but that this method of payment was purely statutory, and that Section 19 repealed these statutory provisions before the Seminole Agreement was ratified by Congress; and that the Seminole Agreement did not repeal Section 19 for the manner of disbursement of Seminole moneys under each provision is the same. The court states (Rec. 25, 26):

> "The defendant says that section 19 of the Curtis Act was not applicable to the Seminole Nation for the reason that the Agreement negotiated November 16, 1897, between the United States and the Seminole Nation approved and ratified on July 1, 1898 (30 Stat. 567), 'superseded and repealed any and all provisions of the Curtis Act inconsistent therewith' and that the said agreement 'did not in anywise affect the provisions of the then existing treaties between the Seminole Nation and the United States, except insofar as such provisions might be inconsistent therewith.' This contention assumes necessarily, we think, that the right of the Seminole Nation to have moneys due it from the United States paid into the Seminole tribal treasury was secured to the tribe by then existing treaty provisions. This is not the case. No such provision is found in any treaty between the United States and the Seminole Nation. The right of the Secretary of the Interior to pay Seminole tribal funds into the tribal treasury, as well as the right of the tribal authorities to receive and disburse such funds was purely statutory, created by the acts of April 15, 1874, and March 2, 1889, heretofore referred to. These acts were repealed by section 19 of the Curtis Act and were nonexistent when the Seminole agreement was ratified on July 1, 1898. There is nothing in the agreement inconsistent with the provisions of section 19 of the Curtis Act, and the contention that the effect of the agreement was to repeal or supersede the provisions of this section is without merit."

The unscrupulous tribal officers at whom Section 19 was aimed had been present in Washington to oppose it. The

Dawes Commission, in its report of October 3, 1898, comments as follows:

> "The knowledge of the preparation of this bill (Curtis) aroused great opposition of those in the Territory opposed to any change in the exclusive use of tribal property by the few controlling the government of the Territory. Accordingly large delegations were sent to Washington, at great expense to their national treasuries, for the purpose of preventing such legislation and procuring, if possible, the repeal of the law taking away so much of their political power, which was to take effect January 1, 1898. It was deemed necessary, therefore, to require the presence of the commission in Washington during the pendency of such legislation to give information to the committees having it in charge as to the real condition of the Territory and the needs of and character of the legislation proposed."

With their cause lost before Congress, these tribal officers took the only course then open to them—to attempt to avoid the operation of Section 19 through administrative action. They asked the Secretary of the Interior to pass upon the question now before us.

During the period of this whole transformation, Mr. Justice Van Devanter occupied the position of Assistant Attorney General for the Interior Department. He perforce came into contact with the members of the Dawes Commission, with the representatives of the various tribes, and with everyone interested in drafting and discussing the laws which would prevent the then existing abuses in the Indian Territory. He knew the history of the abuses and the purpose and intent of both executives and legislators to correct them.

When this question now before us was first raised it was presented to Assistant Attorney General Van Devanter for an opinion. With all of this light before him he held that there was no inconsistency between Section 19 and the Seminole Agreement. This opinion is as follows:

DEPARTMENT OF THE INTERIOR

Office of the Assistant Attorney-General
Washington

July 12, 1898.

The Secretary
Of the Interior,

Sir:

By your communication of July 9, 1898, I am asked for an opinion whether section 19 of an act of Congress approved June 28, 1898 (Public-No. 162), entitled "An act for the protection of the people of the Indian Territory, and for other purposes," applies to the Seminole Nation of Indians.

Said section is as follows:

That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

It is submitted that until the passage of this act it had been the practice of this Department, under the laws and regulations then in force, to deposit "such funds" in bulk with the Assistant Treasurer of the United States, at St. Louis, to the credit of the treasurers of "these tribes," to be disbursed by them in their own way, under the laws of their respective nations.

By the expression "such funds" and "these tribes," used in your communication, I take it is meant moneys due any of the five civilized tribes from the United States government. The practice of this Department, therefore, has been to deposit any moneys, subject to disbursement on account of these tribes, with the Assistant Treasurer, at St. Louis, to the credit of the treasurers thereof, to be disbursed by them without the further supervision of the government.

Section one of the act, *supra*, provides that the word "officer," where the same appears in the criminal laws

theretofore extended over and put in force in the Indian Territory, shall include all officers "of the several tribes or nations of Indians in said Territory."

Section 2 authorizes and requires the Judge of a United States Court of any district in said Territory to make "any tribe" of Indians a party to any suit pending in his court where it appears that the property of such tribe in in any way affected by the issues being heard.

Section 3 confers jurisdiction on the United States district courts in said Territory to try cases against persons who claim to hold lands and tenements as members of a tribe, and whose membership is denied by the tribe, and provides that "if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the commission to the *Five Tribes*, or the United States court * * * then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same."

Section 4 provides, "That all persons who have heretofore made improvements on lands belonging to any one of the said tribes of Indians" may under certain conditions sell and dispose of the same.

Section 11 provides for the allotment of lands when the roll of citizenship of "any one of said nations or tribes" is fully completed.

Section 15 provides, "That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek and Cherokee tribes," who shall cause to be surveyed and laid out townsites.

Section 16 makes it unlawful for any person to claim, demand or receive any royalty or rents on any lands or property belonging to "any one of said tribes or nations in said Territory."

Section 17 provides that it shall be unlawful for "any citizen of any one of said tribes" to hold possession of more than his approximate share of the allotted lands.

It is apparent from these excerpts from the act that section 19 prohibits the payment by the United States of

moneys on any account whatever to officers or tribal governments of *any* of the five civilized tribes.

The Seminole Indians as such are nowhere mentioned in the act, but these Indians constitute one of the five civilized tribes, and are within the inhibition of said section, unless, as to them, it has been repealed by subsequent legislation.

An act approved July 1, 1898 (Public—No. 172), ratified the agreement of December 16, 1897, between the Dawes Commission and the Seminole Nation of Indians. One of the stipulations of that agreement was, that:

All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided, and reserving said sum of five hundred thousand dollars for school fund, shall be paid per capita to the members of said tribe in three equal instalments, the first to be made as soon as convenient, after allotment and extinguishment of the tribal government. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements."

The act *supra*, which ratifies and confirms this agreement, repeals "all laws and parts of laws inconsistent therewith."

There is nothing in the language quoted inconsistent with the provisions of section 19 of the act of June 28, 1898, *supra*. Indeed, these provisions in the two acts are substantially the same. The provision in the Seminole act that "all moneys belonging to the Seminole Indians * * * shall be paid *per capita* to the members of said tribe," the first payment to be made after the "extinguishment of tribal government" "by a person appointed by the Secretary of the Interior," is the substantial equivalent of the language used in the general act that payments shall not be made "to any of the tribal governments or any officer thereof," but shall be made per capita direct to each individual, "under direction of the Secretary of the Interior by an officer appointed by him."

I have therefore to advise that section 19 of the act of June 28, 1898, applies to the Seminole Nation of Indians. Moreover, it results from what has been hereinbefore said

that whether that act applies or not, the manner of disbursement under the Seminole act must be the same.

Very respectfully,

WILLIS VAN DEVANTER.
Assistant Attorney General.

Department of the Interior,
July 12, 1898,

Approved:
THOS. RYAN,
Acting Secretary.

Thunderstruck at the Van Devanter opinion these tribal officers employed Crawford to represent them. Crawford, knowing that the Comptroller had under consideration a similar question concerning the Creek funds, got the matter transferred to the Comptroller. The Comptroller then rendered practically the same opinion in both Creek and Seminole matters.* Although the Secretary refused to follow the Comptroller's decision in the Creek matter, yet he followed the Comptroller's decision in the Seminole, and began turning over the funds to Brown, *et al.*, the tribal officers.

The lower court, in commenting upon the Van Devanter opinion, states as follows (Rec. 26):

> "While this opinion was not controlling as to the action of the Secretary of the Interior, and was shortly thereafter withdrawn by the Assistant Attorney General for that reason, it was a correct decision of the legal question presented—a decision by an outstanding authority on the interpretation of Indian treaties and laws."

The Van Devanter opinion was withdrawn, *but never repudiated*, and the Secretary, following the Comptroller's decision, continued to pay Seminole tribal income to the tribal officers in violation of Section 19. Thus the very

*For the convenience of the court we have printed the decision of the Comptroller in the Creek matter in the Appendix to this brief, page 75.

purpose of this legislation was wholly disregarded, and as the lower court states (Rec. 25), the continuation of the "'irreparable wrongs and outrages upon a helpless people' was made possible."

The Petitioner states (Pet. Br. 51) that it does not *disagree* with the result reached by Assistant Attorney General Van Devanter, and attempts to explain away his opinion. This opinion is direct and plain, and applies to *all* Seminole moneys, and if petitioner does not disagree with it no issue is now before this court on this question—it is conceded in favor of respondent's position.

The petitioner further contends (Pet. Br. 57) that Congress impliedly ratified the acts of the Secretary of the Interior in violating the plain language of Section 19, by continuing to make appropriations for the payment of interest on the Seminole trusts after the Secretary's action had been reported to it. The reports relied upon by petitioner (Pet. Br. 56) were those made to the Commissioner of Indian Affairs, and not to Congress directly, and there is no showing that Congress ever had them under consideration. An examination of the appropriation acts covering this period, cited by petitioner (Pet. Br. 57), shows clearly that Congress not only did not ratify, either expressly or impliedly, these illegal payments, but in each of these appropriation acts Congress provided that this income be paid *in accordance with* the Seminole treaties—*paid by the United States for the specific purposes*—the manner of disbursement provided in Section 19.

THE QUESTION OF ADMINISTRATIVE CONSTRUCTION.

The petitioner further contends that the administrative construction of the Curtis Act has been consistent, and therefore should be followed by the court (Pet. Br. 57). We will analyze this contention for the court in the light of the record before us.

The only administrative construction of the *language* of Section 19, is found in the decision of the Comptroller in the Creek matter (5 Comp. Dec. 93), and that part of his decision dealing with this phase of the question is quoted *supra* at page 33. As we have seen, the petitioner in the Creek case based its defense on this broad construction, but now takes a diametrically opposite view of Section 19 in an effort to avoid this broad construction.

It is upon Comptroller Mitchell's decision of August 23, 1898, in this Seminole case, holding that Section 19 is repealed by the Seminole Agreement, that petitioner evidently bases its contention that the administrative construction of the Seminole Agreement should be followed. However, from the very inception of this question there has been a divergence of opinion upon it, and, therefore, the administrative construction was most inconsistent, and not consistent, as contended by petitioner.

To answer this contention of petitioner let us continue our narrative of what happened in regard to these opinions and bring it to an almost unbelievable conclusion. Disregarding the Van Devanter opinion, the Secretary refused to disburse these funds himself, turning them over to the Seminole tribal officials until the fiscal year 1907, when the Act of April 26, 1906, c. 1876, 34 Stat. 137, became effective.

The Act of 1906 was a general law applying to all of the Five Civilized Tribes, and under it the Secretary was given control over the tribal schools and the right to pay certain claims. The Secretary then asked the Comptroller the following question:

> "1. Whether, under the provisions of sections 11 and 28 of the act of April 26, 1906 (34 Stat., 137), expenditures from the tribal funds and distribution of annuities arising therefrom to members of the Seminole tribe should be made by the tribal authorities of the Seminole Nation or under the direction of the Secretary of the Interior."

The Comptroller replied (App. Pet. Br. 39), referring to and reaffirming his decision of August 23, 1898, which overrules the Van Devanter opinion, and following the same reasoning and quoting this earlier decision, held that a part of the funds should be turned over to Brown, *et al.*, but that the Act of 1906, being so specific, required that the Secretary disburse a part of these funds for certain specific purposes.

Dissatisfied with "half a loaf", and reversing the order of their former proceeding of having the question referred from the Assistant Attorney General to the Comptroller, Brown and Crawford now got the question referred from the Comptroller to the Attorney General.* They attacked the constitutionality of the Act of 1906, which deprived them of a part of these Seminole funds. Passing upon all the questions involved, and unswayed by political influence, Attorney General Bonaparte (26 Op. Attys. Gen. 340) held that none of the Seminole funds were to be turned over to Brown, *et al.*, but that all of these funds were to be disbursed by the Secretary. Thenceforth the Secretary disregarded the Comptroller's decision, and followed the Attorney General's opinion, disbursing all of these funds himself, and our cause of action ceases.

Let us call attention to the fact that in this last decision, while another and later act had entered into the matter, the Comptroller followed exactly the same reasoning he used in overruling the Van Devanter opinion—in fact, he quoted that former decision and made it a part of this later one, thus affirming it. While Attorney General Bonaparte does not mention Section 19 or pass upon the effect of it, for a later statute is involved, his line of reasoning is very much the same as that used by Assistant Attorney General Van Devanter. And finally the Comptroller is forced to come to the same conclusion as did Attorney General Bonaparte (Resp. Br. Opp. Certi. 27).

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*The Attorney-General's opinion (26 Op. Attys.-Gen. 340) shows that John J. Brown, principal chief of the Seminoles, raised the questions passed upon therein.

From what we have thus before us it strikes us most forcibly that the Comptroller could not have been right the first time and Justice Van Devanter wrong, if the Comptroller was wrong the second time, and Attorney General Bonaparte right.

As we have seen, in both this case and the Creek case, supra, there was a Comptroller's decision holding that, after the ratification of the Creek and Seminole Agreements, Section 19 of the Curtis Act was inapplicable. In the Creek case the Secretary of the Interior had this Comptroller's decision (5 Comp. Dec. 93) upon the effect of Section 19 for his guidance, but he entirely disregarded it after the Creek Agreement of 1901 became effective, and continued to disburse Creek funds under Section 19 instead of paying them over to the Creek tribal officials. We refer to this Creek decision to negative any suggestion that the fact that there was a Comptroller's decision in the Seminole case should in any way distinguish it from the Creek case. As the Secretary disregarded the decision of the Comptroller in the Creek case, the mere fact that he followed a decision of that officer in the Seminole case would not clothe the latter decision with greater dignity, nor could such action affect the question before us upon its legal merits. In other words, it cannot be said that the Comptroller's decision in this case is a defense for the Secretary's action, because he disregarded Comptroller's decisions at will, disregarding one in the Creek matter, and following one in the Seminole matter.

Let us make this plain to the court: That in urging the exact similarity of the Creek and Seminole Comptrollers' decisions we refer specifically to their mutual holdings that both the Creek and Seminole Agreements repeal Section 19 of the Curtis Act, and in doing so revive the right of the tribal officials to disburse the tribal funds. We have seen that this is altogether contrary to the expressed intent of the legislators and executive officers in working out the gen-

eral scheme of abolishing the corrupt practices existing in the old tribal governments.*

Thus it is evident to the court that the Secretary of the Interior disregarded Comptrollers' decisions at will; and also that on the question of the repeal of Section 19 by the Seminole Agreement the Comptroller and Assistant Attorney General Van Devanter take different views. The lower court decided that the Van Devanter opinion was the correct one. Although the Secretary is bound by these Comptrollers' decisions, yet the courts are not so bound and may decide the question before us in accordance with the clear intent of Congress in the passage of Section 19 and the Seminole Agreement.

Under the circumstances enumerated above, we do not believe that the petitioner can successfully contend that the court should apply the rule of administrative construction. In *Houghton* v. *Payne*, 194 U. S. 88, 99, this court states as follows:

> "* * * it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. United States v. Graham, 110 U. S. 219; United States v. Fin-

*For the sake of perhaps superfluous accuracy in our presentation let us point out to the court that the Comptroller's decision in the Creek case is based upon an erroneous assumption that Section 30 of the Curtis Act, and particularly paragraphs 35 and 38 of the Creek Agreement embodied therein, became law upon its ratification by Congress. Evidently he overlooked the provision in Section 30 which required its subsequent adoption by the tribe. As a matter of fact, this Agreement was never adopted by the Creek tribe. However, a similar Agreement was executed with the Creeks, and was approved by Congress by Act of March 1, 1901, c. 676, 31 Stat. 861. Sections 32 and 44 of this last mentioned agreement contained substantially the same provisions as were contained in the one embodied in the Curtis Act, and relied upon by the Comptroller in the Creek decision. This being true, what the Comptroller said as to the unratified Creek Agreement, in legal effect applies equally to the later ratified Agreement. We point this out merely to acquaint the court with the slightest matter that might possibly enter into the question. As Mr. Justice Van Devanter states in his opinion in the Seminole case, which is equally true in the Creek case though it is at variance with these Comptrollers' decisions, the manner of disbursement under the Seminole Agreement is the same as under Section 19 of the Curtis Act, and therefore no inconsistency exists between them; consequently no question of repeal arises.

> nel, 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the court as to the original correctness of such construction. A custom of the department, however long continued by successive officers, must yield to the positive language of the statute. As was said in the Graham case (p. 221), 'if there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. But with the language clear and precise, and with its meaning evident, there is no room for construction and consequently no need of anything to give it aid. The cases to this effect are numerous'."

The language of Section 19 is clear; its intent is plainly evident from its history, and the Secretary should have followed it.

We want the court to realize fully that we are not basing our claim upon a mere technical violation of the rights of respondent. Respondent is not suing for funds of which it received a benefit, even though they were paid in violation of law. The fact is that while Congress undertook to protect the tribe from these dishonest officials, and while the officers of petitioner knew that Brown and his associates were converting the Seminole tribal funds to their own uses and keeping no account thereof, the officers of petitioner deprived the tribe of these funds by disregarding the provisions of law made for the protection of the Seminole tribe and turned the funds over to the tribal officers to be squandered and embezzled. The tribal funds simply went into a greedy maw—the funds simply disappeared, and the real owner of these funds got no benefit from them.

The protection of the tribe by preventing the looting of its funds was the vital purpose of all of this legislation. Petitioner's officers, though warned by the Van Devanter opinion, failed to afford the tribe the benefit of this protection, and continued to turn over Seminole funds to these despoilers.

It is respectfully submitted that the lower court was right in its holding (Rec. 26) that:

> "The Secretary of the Interior was therefore without legal authority to pay Seminole tribal funds into the Seminole tribal treasury. More than that he was plainly prohibited by law from doing so. The payments being clearly illegal, the plaintiff is entitled to recover the amount shown by finding XII, which is the sum of $864,702.58."

Petitioner's contention B.

The petitioner contends (Pet. Br. 58) that:

> If the payments were merely in violation of Section 19 of the Curtis Act, the Seminoles have no standing to complain of that violation since the section gave to them no right of action.

This contention is based upon petitioner's interpretation of the decision of this court in *Sac and Fox Indians of the Mississippi in Iowa* v. *Sac and Fox Indians of the Mississippi in Oklahoma, and the United States*, 220 U. S. 481. In that case no question of a deliberate violation of an act of Congress by the Secretary of the Interior is involved, but the court held that the Secretary had implicitly followed the directions of Congress in paying the *tribe* its *tribal annuities*. Thus the decision in that case has no application to the question now before us.

A careful analysis of the decision in the Sac and Fox case shows clearly that it does not support, either in fact or in principle, any such contention as petitioner advances above. This case was one in which a small *band* of Sac and Fox Indians severed their connections with the Sac and Fox *tribe*, the band thereafter living in Iowa, and the tribe living in Kansas, and later in Oklahoma. The Treaty of 1859 with the Sac and Fox *tribe* provided in substance that if the Indians who divorced themselves from the tribe did not rejoin their tribe in Kansas within one year thereafter, they would lose their treaty rights. These Indians in Iowa

did not rejoin their tribe, and therefore *lost their tribal rights.* The Sac and Fox Treaty of 1842 provided for certain annuities to be paid the *tribe,* and the Act of 1852 provided in substance that these annuities be paid directly to the *tribe.* Thereafter the Acts of March 2, 1867 and July 4, 1884 provided for a pro rata division of tribal annuities between the tribe and the band in Iowa. Later the Sac and Fox Indians in Iowa sued the United States claiming (1) that the Act of 1852 gave them a vested right as *individuals* to sue for a share of the *tribal* annuities, and (2) that the Government failed to distribute properly the moneys due them under the Acts of 1867 and 1884. As to contention (1) the court held that the Acts of 1852, 1867, and 1884 did not give the Iowa Indians as *individuals* any vested rights to sue the United States for the annuities due the *tribe;* that the Government did not deal with individuals but with tribes and that annuity promises in the treaties were promises to the tribe, and therefore the *tribe* only could complain about the failure to pay them; and that in the Acts of 1852, 1867, and 1884 there was no intimation of an intent to change the terms of the treaties so as to permit *individuals* to sue for violations of them. As to contention (2), the court held that the proof failed to support the contention that a proper distribution of the moneys had not been made by the Secretary to the Indians in Iowa.

This decision clearly shows that it is inapplicable to the Seminole case for two reasons: (1) That the Seminole *Nation* is suing in the case at bar for moneys due it which were paid by the Secretary in violation of Section 19 to tribal officers who embezzled them and who were not entitled to receive them, and that in not following Section 19 the Secretary failed to comply with a condition of the trust as dictated by Congress; and (2) that Section 19 was intended to change the manner of disbursement of Seminole funds which existed prior to its passage, in order that the Seminole Nation would be insured of the receipt of its annuities. We will discuss these points separately below.

(1)

The jurisdictional act of 1924, under which this suit was filed, authorized the *Seminole Nation* to adjudicate any and all legal and equitable claims arising under Seminole treaties and agreements, and arising or growing out of any act of Congress in relation to Indian Affairs. The Seminole Nation is suing as a *tribe*,—not as individuals who had lost their treaty rights as in the Sac and Fox case; it is suing as a tribe for the first time in its history to recover moneys due it as a tribe. Our cause of action arose because the Secretary of the Interior failed to comply with the plain mandate of Congress as expressed in Section 19 of the Curtis Act, and because of his failure so to comply, Seminole moneys were paid over to the tribal officers who were not then entitled to receive them in behalf of the tribe. These Seminole moneys were not paid to the Seminole Nation, but were paid to persons who, because of Section 19, were not representative of the tribe in the matter of the receipt and disbursement of these funds, and, therefore, these moneys were paid to the wrong beneficiary.

It is well settled that a trustee makes payments at his peril, and that a mistaken interpretation of the law is no excuse for illegal payments. Bogert, Trusts and Trustees, page 2363. The principle is stated in *Burnell* v. *United States*, 44 C. Cls. 535, 548, as follows:

> "Hence, the general rule that a trustee is bound, at his peril, to see to the proper application of the trust fund applies to the government as well as to an individual trustee. (Borcherlin's Case, 35 C. Cls. R., 312, which was affirmed by the Supreme Court, 185 U. S. R. 223). It must, therefore, be apparent that if the treasury department in the case at bar made payment out of a fund which it held in trust, through a mistake of law, to the party in law not entitled to receive the same, it transcended its authority and is responsible therefor to the rightful owner of the funds."

(2)

In this case Congress, in passing Section 19, intended to, and did plainly change the manner of disbursing Seminole trust funds, in order to insure to the Seminole Nation the benefit of them. In the Sac and Fox case no change in any prior treaty or Act of Congress was intended. In the Seminole case the payment of tribal income to the tribal officers was authorized by the Acts of 1874 and 1889. As we have seen heretofore, Congress intended by the passage of Section 19, to transfer the right to disburse Seminole funds from the tribal officers to the Secretary of the Interior.

As the lower court said concerning Section 19 (Rec. 25):

> "* * * No more wholesome or humane provision was ever written into an Indian statute, and the Seminole Indians were entitled to its protection in the distribution of all tribal income due them from the United States. This protection, however, was not afforded them, and a continuation of the 'irreparable wrongs and outrages upon a helpless people' was made possible by payment thereafter of large sums of their tribal funds to the tribal treasurer."

Petitioner's contention C.

The petitioner contends (Pet. Br. 65) that:

> If the payments were in violation of Section 19 of the Curtis Act, the Seminoles are estopped to complain, inasmuch as the payments were made at their request and with their consent.

This contention was raised for the first time in the court below when it became a part of petitioner's first motion for new trial. As this contention, and the adequate answer to it, would arise out of the facts, many of which are not in the record, but which were before the lower court, it is difficult to enter into a thorough discussion of this question. Suffice it to say that the lower court, having all of the facts

before it—including a protest of the Seminoles to the continuation of payments of their tribal income to the tribal officers after Section 19 was passed—thought there was no merit to this contention and overruled it.

This contention assumes, without proof in the record, (1) that the illegal payments were made at the request and with the consent of the Seminole Nation, and (2) that the Seminole Nation received the benefit of them. In effect, this contention amounts to this: That after Congress has prohibited payments of tribal moneys to the tribal officials these officers are, nevertheless, agents of the tribe to receive them; in other words, that Congress cannot bind these tribal officers so as to prevent payments of Seminole moneys to them.

The petitioner relies upon a statement of Comptroller Mitchell in his decision of August 23, 1898, to the effect that the Seminole tribe insisted that the tribal income be paid into the tribal treasury after Section 19 was passed. It is evident to the court that these *unscrupulous tribal officials insisted* that these payments should continue to be made to them, and it was through the efforts of these tribal officials that the Comptroller rendered this decision. The efforts of the tribal officers to prevent the application of Section 19 to them could not bind the tribe, for under this section these officials ceased to be representative of the tribe in the matter of the receipt and disbursement of the tribal income. Therefore, their acts could not work out an estoppel against the tribe. The doctrine of estoppel is a salutary one, and is applied to prevent fraud and not to shield it; and therefore it is submitted that this doctrine could not properly be applied to excuse the petitioner from its violation of the law as laid down in Section 19, thus aiding the continuation of frauds committed upon the tribe by the tribal officers.

Whatever relief the Seminole tribal officials desired from the operation of Section 19 should not have been through

administrative action, but through further legislation by Congress. With the doors of Congress closed to them they set about to avoid Section 19 by the only means left to them. They first asked the Secretary for an opinion, and this request resulted in the Van Devanter opinion. This opinion being adverse to them, they had the question transferred to the Comptroller, who overruled the Van Devanter opinion. When the same question came up under the Act of April 26, 1906, the same course was followed. The Comptroller rendered the first opinion, and not being satisfied with the result, Chief Brown had the matter transferred to Attorney General Bonaparte, who overruled the Comptroller. All of these efforts were made by these officers in order that they might continue to use the tribal funds for their own private purposes, as they had done before the passage of Section 19 of the Curtis Act.

Congress, in Section 19, prohibited the Secretary from continuing to pay over these funds to the tribal officers. In the face of this positive prohibition by Congress, and all of the history behind it, petitioner cannot now say that it lacked knowledge of the facts, or was misled by any acts of the Seminole tribe. It is a well established principle of law that:

> "As a corollary to the proposition that the party setting up an estoppel must have acted in reliance upon the conduct or representations of the party sought to be estopped, it is as a general rule essential that the former should not only have been destitute of knowledge of the real facts as to the matter in controversy, but should have also been without convenient or ready means of acquiring such knowledge. One relying on an estoppel must have exercised such reasonable diligence as the circumstances of the case require. If he conducts himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss he cannot invoke the doctrine of estoppel." 21 C. J. 1129-1130.

Therefore, it is respectfully submitted that the unauthorized efforts of the Seminole tribal officers in securing the erroneous Comptroller's decision, coupled with the illegal action of the Secretary in following this decision, could not lawfully defeat the purposes intended to be accomplished by Congress in the passage of Section 19 of the Curtis Act.

Petitioner's Contention III.

The petitioner contends (Pet. Br. 66) that:

> The Government is not liable to the Seminoles for the $57,500 which it paid out of the trust funds established by Article III of the Treaty of 1866 to the tribal treasurer from 1875 to 1898 inclusive.

The petitioner then sets up the provision of Article III of the Treaty of 1866 which requires that the $2,500 annual interest on the $50,000 fund be paid annually for the support of schools. The lower court found that during the period from 1875 to 1898, inclusive, the Government paid the annuity direct to the tribal treasurer (Rec. 13, fdg. IX). Notwithstanding this plain violation of this treaty provision, petitioner contends "that this payment was perfectly proper and in accordance with the treaty" (Pet. Br. 67). It is difficult for us to follow this reasoning of petitioner.

The claim for this $57,500 of the income from the $50,000 fund established by the Treaty of 1866 for school purposes, arose out of the misapplication by petitioner of the Act of April 15, 1874, c. 97, 18 Stat. 29, to these funds. The Act of 1874 clearly applied only to funds arising out of Article VIII of the Treaty of 1856. The lower court in its opinion (Rec. 22), states as follows:

> "* * * Neither the Act of 1874, nor any subsequent act of Congress, conferred authority on the Secretary of the Interior to disburse moneys due the plaintiff tribe under the Treaty of 1866 in any manner other than that provided in the Treaty.

> "The Treaty provided that the interest on the permanent school fund of $50,000 be then 'paid annually and appropriated to the support of schools.' Congress never authorized disbursements of this fund to be otherwise made. * * *"

Therefore, this provision of the Treaty of 1866 was never performed by petitioner. Furthermore, Section 2097 of the Revised Statutes (quoted, *supra*, p. 15) prohibited disbursements in any other manner. In granting recovery on this item the lower court simply applied the rule that the respondent is entitled to have the full amount due it under the terms of its treaty disbursed in the manner and for the precise purposes named in the treaty unless Congress by subsequent legislation provides that payments be otherwise made. The lower court (Rec. 20) answers petitioner's contention when it aptly states that "It is no defense to say, even if the fact was shown, that they were paid out for other purposes for which the tribe received the benefit." We discuss this phase of the case later under the matter of credits claimed by petitioner (pp. 66-67).

Here again petitioner attempts to argue that respondent consented to this treaty violation. No such consent is set forth in the record. We simply have before us a plain violation of this treaty provision, of which respondent, being under a disability, was unable to complain. When Congress passed the jurisdictional act of 1924 permitting respondent to present any and all legal and equitable claims arising and growing out of any of its treaties with the United States, and waived the statute of limitations, this disability was raised, and for the first time in its history the Seminole Nation was permitted to sue for violations of these treaty provisions. That Congress permitted respondent to do this is not open to question by petitioner, as this is a question of legislative policy.

Petitioner's Contention IV.

The petitioner contends (Pet. Br. 68) that:

> The Government is not liable to the Seminoles for the $154,455.30 which it paid from 1920 to 1930 inclusive out of the principal of the $500,000 trust fund set apart by the Seminole Agreement of 1897.

The question presented resolves itself into a simple one: whether or not Congress modified by subsequent legislation the terms of the Seminole Agreement so as to permit payments from the principal of the permanent school fund during the fiscal years 1920 to 1930, the period covered by the claim.

The Seminole Agreement of 1897, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, 568, provided as follows:

> "Five hundred thousand dollars ($500,000.00) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five per cent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country."

Commenting upon this provision, the lower court states as follows:

> "The fund under the provisions of the agreement was to be a 'permanent school fund' for the education of children of members of the Seminole tribe, the Secretary of the Interior being authorized to apply only the interest thereon for that purpose. He could not under the terms of the agreement expend any part of the principal fund for education or for any other purpose." (Rec. 27.)

Petitioner contends (Pet. Br. 70) that the Act of May 25, 1918, c. 86, 40 Stat. 561, 580, modified the terms of the Seminole Agreement, and authorized such payments, and that the authorization in this act continued over the period covered by this claim—from the fiscal years 1920 to 1930. This Act provided in part as follows (*supra*, 580, 581):

> "That the Secretary of the Interior be, and he is hereby, authorized to pay to the enrolled members of the Seminole Tribe of Indians of Oklahoma entitled under existing law to share in the funds of said tribe, or to their lawful heirs, out of the *Seminole school fund*, or any moneys belonging to said tribe in the United States Treasury or deposited in any bank or held by an official under the jurisdiction of the Secretary of the Interior, not to exceed $100 per capita: Provided, That said payment shall be made under such rules and regulations as the Secretary of the Interior may prescribe: * * *"
>
> * * * * * * * * * *
>
> "* * * Provided further, That during the fiscal year ending June thirtieth, nineteen hundred and nineteen, no moneys shall be expended from tribal funds belonging to the Five Civilized Tribes, without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes," etc.

We readily admit that the Act of 1918 specifically authorized a per capita payment out of this Seminole School Fund principal during the fiscal year *1919*, and no claim was made for the amount so disbursed. However, the authorization in this act applied to the fiscal year *1919* only, and did not continue beyond the close of this fiscal year—June 30, 1919. Respondent's claim began with the fiscal year *1920*, and it is our contention that the remaining balance of this fund was subject to the original law governing this school fund as provided in the Seminole Agreement, and that no act of Congress specifically authorized a further depletion of the

balance of the principal of this fund during the period covered by this claim.

The Seminole Nation had two tribal schools, the Emahaka and Mekasuky Academies, which were supported out of the income from the Seminole School Fund. Because of an erroneous survey of the division line between the Creek and Seminole Nations, the Emahaka Academy had been built mostly on Creek, instead of Seminole lands. Thereafter the land upon which the school was built was allotted to a Creek Indian, who sold it to one Ferguson. The United States sued to cancel the deed to Ferguson claiming that the Creek allottee was a full-blood, that this land was restricted and therefore inalienable. Because of the unsuccessful outcome of this litigation the Emahaka Academy was abandoned. (See *United States* v. *Ferguson*, 247 U. S. 175). This left Mekasuky Academy only to be supported out of the income of the Seminole School Fund, and it was thought that after the reduction of the principal by the per capita payment in the fiscal year 1919, sufficient of the principal would be left in the fund to provide income enough to support this remaining school.

As the Indian Appropriation Act of May 25, 1918 applied to the fiscal year *1919 only*, subsequent legislation must be examined to determine whether or not Congress authorized further reductions of the remaining principal of the Seminole School Fund.

Petitioner contends that the Act of June 30, 1919, c. 4, 41 Stat. 3, 23, appropriating for the fiscal year 1920 (the year in which our claim began), provides such authority. This act generally provides:

> "That during the fiscal year ending June 30, 1920, no moneys shall be expended from tribal funds belonging to the Five Civilized Tribes, without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes."

A comparison of the language of this provision with that of the Act of May 25, 1918, quoted *supra,* shows clearly the difference in these two authorizations, and it becomes most evident that the language of the Act of June 30, 1919, does not authorize further depletions of the principal of the Seminole School Fund.

Then, too, similar general provisions to that contained in the Act of June 30, 1919, are contained in each of the annual appropriation acts beginning with the Act of August 24, 1912, c. 388, 37 Stat. 518, 531, which provides as follows:

> "That during the fiscal year ending June thirtieth, nineteen hundred and thirteen, no moneys shall be expended from the tribal funds belonging to the Five Civilized Tribes without specific appropriation by Congress, except as follows: Equalization of allotments, per capita and other payments authorized by law to individual members of the respective tribes."

Had Congress intended to reduce further the principal of the Seminole School Fund in the act of June 30, 1919, it would not have reverted to the general language contained in the regular appropriation acts from 1912 on, but would have specifically provided for such reduction, as was done in the Act of May 25, 1918. Under the provisions of these appropriation acts *specific appropriations* were required before the principal of the Seminole School Fund could be further lawfully reduced. Petitioner has pointed out no such specific authority.

Petitioner further relies upon the general authorizations in the annual Indian appropriation acts (beginning with the Act of May 18, 1916, c. 125, 39 Stat. 123, 148) giving the Secretary the right to continue tribal schools of the Five Civilized Tribes from tribal funds. These provisions, insofar as they affect Seminole funds generally, authorized payments for Seminole schools from general funds of the tribe, which were used together with the interest on the Seminole School Fund, for the continuance of schools. However, there is no specific authority in such provisions for

depletions of the Seminole School Fund *principal*. The intent of these provisions would seem to be directly to the contrary, for to reduce further the principal of the permanent school fund would cut off the income therefrom, and would accordingly reduce the means by which the remaining school of the Seminoles might be continued.

Let us impress upon the court that the "Seminole School Fund," which is governed by the provisions of the Seminole Agreement, is a *special* fund set aside for a special purpose—that of providing sufficient income permanently for the education of the Seminoles. Unlike other general Seminole funds, this school fund was not available for general disbursements. Therefore, the general authorizations in the yearly appropriation acts to pay per capita payments, etc., and to continue tribal schools, from moneys of the Five Civilized Tribes, relied upon by petitioner, could have no possible application to the Seminole School Fund, and would not authorize depletions of the principal of this fund. Congress would have to act specifically to do so.

We believe that the lower court completely answers petitioner's contention as follows (Rec. 27):

> "That Congress had the power to change the terms of the agreement and authorize these payments is well established, but we find no act of Congress that either in express terms or by necessary implication authorized any of them."

Petitioner's Contention V.

The petitioner contends (Pet. Br. 74) that:

> The Government is not liable to the Seminoles for $9,068.24 on account of its promise, under Article VI of the Treaty of 1866, to construct agency buildings.

This contention, in effect, is that when petitioner promises to expend not to exceed $10,000 to construct agency buildings within the Seminole Nation, it may or may not conform to its treaty promise, as it so pleases. The lower court

held that petitioner was bound by its treaty promise, and was obligated to construct these agency buildings, and that petitioner was liable to respondent when it did not do so but instead misspent the amount appropriated by Congress for this treaty purpose.

The obligation of the Government under Article VI of the Treaty of 1866 was part of the consideration for a cession by the Seminole Nation to the United States of 2,169,080 acres of land (Article III, Treaty of March 21, 1866, 14 Stat. 755). This money was due and owing to the Seminoles, and they gave their land for it. The sole question now before us is whether the Government conformed to its treaty promise to them.

The lower court permitted recovery in the amount of $9,068.24, the difference between the $10,000 obligation, and $931.76 expended for agency buildings and repairs (Rec. 22, 23), after the court found that $9,030.15 of the $10,000 appropriated by Congress had been misspent. The court found the facts as follows:

> "It does not appear for what purpose the $9,030.15 expended out of this appropriation was used, but it was not used for the purpose of erecting agency buildings." (Finding XI; Rec. 14).

The facts also disclosed that Congress appropriated $10,000 in the Act of July 28, 1866, c. 296, 14 Stat. 310, 319, to fulfill this treaty obligation, but this sum was not used and was returned to surplus. Congress again appropriated $10,000 to replace the amount returned to surplus, in the Act of May 18, 1872, c. 172, 17 Stat. 122, 132. Congress having twice fixed the amount of this obligation at $10,000 (Finding XI; Rec. 13, 14), the amount of this obligation became definite. It is respectfully submitted that the small payment of $931.76, paid for agency buildings and repairs out of another general appropriation, and not out of the $10,000 appropriation, would not be a substantial compliance with this treaty promise.

As this money was misspent by petitioner's officers after it was appropriated by Congress to fulfill this treaty obligation, recovery for this item could also be sustained for a violation of Section 2097, Rev. Stat. quoted *supra*, page 15.

Petitioner's Contention VI.

The petitioner contends (Pet. Br. 77) that:

> The Government is not liable to the Seminoles for $61,563.42 on account of its promise in Article VIII of the Treaty of 1856 to provide annually for ten years $3,000 for the support of schools, $2,000 for agricultural assistance, and $2,200 for the support of smiths and smith shops.

To support this contention petitioner relies upon (1) the Resolution of February 22, 1862, No. 13, 12 Stat. 614, (2) the provisions of the annual Indian Appropriation Acts from 1862 to 1866, inclusive, and (3) the release in the Treaty of 1866.

The petitioner assumes without proof anywhere in the record that the moneys appropriated to pay these obligations of United States under Article VIII of the Treaty of 1856, were disbursed for refugee Indians. There was no proof in the record below that such was the case, and no finding to that effect was made by the court below (Findings III, IV; Rec. 10, 11).

Refugee Indians, as referred to by petitioner, means Indians of various tribes who had fled into Kansas during the Civil War after this war had victimized them and reduced them to poverty (R. 19). Of a total of $249,731.88 of Seminole moneys diverted during the period of the Civil War—from the fiscal years 1862 to 1866—$31,599.68 only was disbursed for *Seminole* refugees (G. A. O. Rep. p. 28-29). Therefore, the contention of petitioner amounts to saying that this money was confiscated by the Acts of Congress it cites.

The Resolution of February 22, 1862, would no doubt authorize diversions of Seminole annuities for *Seminole*

refugees, but it is submitted that this resolution would not authorize diversions of Seminole moneys for other refugee Indians, not Seminoles; nor by a fair and reasonable construction of the Acts of 1862 to 1866, would Indians other than Seminoles be benefited by payments from Seminole funds.

Concerning the Acts of 1862 to 1866, the lower court states as follows:

> "The act of July 5, 1862, *supra,* was operative only 'during the discretion and pleasure of the President.' It is not shown that the President ever took any action under this statute either by declaring by proclamation the abrogation of 'all treaties' with the Seminoles, or by directing that 'appropriations heretofore or hereafter made' to carry into effect treaty stipulations with them 'be suspended and postponed wholly or in part.' Without action on the part of the President the act by its own terms was ineffective." (Rec. 17.)

Therefore, these acts were never in force as to the Five Civilized Tribes. Upon being urged to act President Lincoln refused and withheld judgment in the matter, and therefore these acts need not now be considered. (See American Indian under Reconstruction, by Dr. Annie Heloise Abel, Lib. Cong., Call No. E540.13A22, notes 496 and 497, pages 251-252).

Before the beginning of the Civil War (1861), and before there was any idea that the Five Civilized Tribes might become involved in it, the petitioner had become indebted to respondent under the above treaty provisions for substantially all of the above amount of $61,563.42. This sum, with no thought of the Civil War, it simply failed to pay in accordance with the treaty provisions. Diversions of Seminole funds for refugee Indians did not begin until the fiscal year 1862, and this amount due the Seminoles under these treaty obligations had accrued before the beginning of "the diversion of annuities" mentioned in the release contained in the Treaty of March 21, 1866, relied upon by petitioner.

We believe that the lower court sufficiently answers the last contention under this release as follows (Rec. 18):

> "* * * The general language, 'The stipulations of this treaty are to be a full settlement of all claims of said Seminole Nation for damages and losses of every kind growing out of the late Rebellion', has no application and cannot be held to include this item of the Seminole claim for the reason that substantially the whole amount claimed was due and unpaid before the outbreak of the war and consequently is not one for 'damages and losses growing out of the War of the Rebellion.' The simple facts are that the United States covenanted with the Seminole Tribe in article VIII of the treaty of 1856, as a part of the consideration for the treaty, to provide annually for them for a period of ten years fixed sums for the support of schools, for agricultural assistance, and for the support of smiths and smith shops among them. In the absence of subsequent specific enactment by Congress to the contrary, the United States was obligated to disburse the funds stipulated in the manner and for the purposes designated in the treaty. The United States failed to discharge this treaty obligation in full, having disbursed only a part of the amount for the purposes named in the treaty. The plaintiff tribe is entitled to recover the undisbursed balance of $61,563.42."*

Petitioner's Contention VII.

The petitioner contends (Pet. Br. 88) that:

> The Government is entitled to have set off against its underpayments of amounts due in some years under Article VIII of the Treaty of 1856 and Article III of the Treaty of 1866 the amounts by which in other years it made overpayments or miscellaneous payments on those and other treaty obligations.

*The release in the Treaty of 1866 defeated a claim of respondent for $150,000 diverted for refugee Indians during the period covered by the Civil War—fiscal years 1862-1866. (Item 2, Finding V, Rec. 18.) The petitioner is now complaining about the claim allowed by the lower court which accrued *prior* to the Civil War period, and is attempting to stretch the conditions prevailing during this period so as to include a claim which arose prior to that time.

The substance of petitioner's argument is that the lower court erred (1) in holding that it "had no jurisdiction to decide whether the Government was entitled to an offset because no counterclaim was pleaded, and (2) in refusing to make certain findings of fact as to overpayments or other miscellaneous payments for which petitioner claimed credit.

That the lower court's decision is based upon more substantial reasons than those stated by petitioner, is evident from its opinion. The court denied this contention for the reasons that (1) the special jurisdictional act under which this suit was brought does not permit such offsets, and (2) it was not established that plaintiff received the benefit of the payments. The lower court states as follows (R. p. 19):

> "The defendant says that even if the funds in question were not disbursed in strict accordance with the terms of the treaty, they were expended for the benefit for the plaintiff tribe, and that no damage resulted to the tribe from the 'diversion' of the funds, even if unauthorized. It is urged that if the United States be technically liable, the tribe having received the benefit of the expenditures, there arises in favor of the United States an equitable counterclaim for the same amount, which the court under section 3 of the jurisdictional act is authorized to pass upon. This contention was urged under like circumstances in The Creek Nation v. United States, *supra,* and was rejected by the court. Section 3 of the jurisdictional act authorizes the court to 'hear, examine, consider, and adjudicate any claims which the United States may have against said Indian Nation.' 'Claims' as used in the section, of course, can mean only legal claims which the United States asserts by way of counterclaim. The United States has asserted no counterclaim, hence there is no claim against the plaintiff tribe which the court is authorized to 'hear, examine, consider, and adjudicate.' Even if the plaintiff received the benefit of the payments, and that fact is not established, they were payments made outside of the provisions of the treaty and as such were gratuities which the court under the jurisdictional act is

without authority to offset against the plaintiff's claim."

In some of the jurisdictional acts in these Indian cases, gratuity offsets are permitted against valid claims. See The Blackfeet Indians case, 81 C. Cls. 101, wherein it is held (*supra*, p. 137) that overpayments of treaty obligations are gratuities, and therefore are offsets under the jurisdictional act in that case. See also The Klamath Indians case, 81 C. Cls. 79. However, no such provision for gratuity offsets is contained in the Seminole jurisdictional act, under which this suit was instituted.

The petitioner has gone outside of the record to set up certain of these items of credit claimed by it, in an attempt to obtain a retrial of the facts in this court. These disputed questions of fact were settled by the lower court when these matters were fairly and completely fought out before it. The petitioner admits (Pet. Br. 89) that the lower court *refused* to make the findings requested. In order to answer properly petitioner's contentions as to these items, we would have to resort to considerable of the evidence filed in the court below. We do not feel justified in doing so in view of the decisions of this court that it will not go behind or review the findings of fact of the Court of Claims. *Sac and Fox Indians* v. *United States*, 220 U. S. 481, 488; *The Sisseton and Wahpeton Indians*, 208 U. S. 561, 566; *Jacob Reed's Sons* v. *United States*, 273 U. S. 200, 202; *Luckenback S. Co.* v. *United States*, 272 U. S. 533, 539-540.

The general law cited by petitioner wherein the trustee has certain discretionary powers, and can make payments for his ward's necessities, is not applicable to the case at bar. However, in the Seminole case the Secretary of the Interior has no discretion in the matter of disbursement of Seminole funds, but is bound by the provisions of treaties and acts of Congress governing these disbursements. The Secretary cannot lawfully disburse Indian funds for purposes other than those stated in the treaties and specific

acts of Congress. As the court has held in the Creek case, to hold otherwise would be equivalent to holding that the Secretary of the Interior and not *Congress* had administrative control over the affairs of Indian tribes (*supra*, p. 5).

CONCLUSION.

It is respectfully submitted that the Court of Claims did not err in granting recovery to the Seminole Nation for the illegal disbursement of its treaty and trust funds, and that its decision should be affirmed for the reasons heretofore mentioned.

Respectfully submitted,

PAUL M. NIEBELL,
W. W. PRYOR,
Attorneys for Respondent.

(E. J. Van Court, deceased)
(J. B. Campbell, deceased)

APPENDIX.

Extracts from Report of Dawes Commission, dated July 25, 1894

Propositions to the Seminoles

Fifth. All invested funds, not devoted to school purposes, and all moneys derived from the sale of town sites, coal and minerals, as well as all moneys found due from the United States, to be divided per capita among the citizens according to their respective rights under the treaties and agreements.

Sixth. All moneys due the citizens of said nation except that devoted to school purposes, to be paid per capita to the citizens entitled thereto by an officer of the United States, to be appointed by the President.

* * * * * * * * * *

Early interviews with us by Commissioners appointed by the several tribes, and with citizens satisfied us that the Indians would not, under any circumstances, agree to cede any portion of their lands to the Government, but would insist that if any agreements were made for allotment of their lands it should all be divided equally among them. Among other reasons assigned, it was stated that a cession to the United States would likely make operative and effective the various railroad grants; that they preferred each to sell his share of the lands and receive the money for it, as if ever their lands were converted into money it would go into the hands of the officers of the tribe, who would swindle them out of a large portion of it. * * *

* * * * * * * * * *

* * * Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property

of the Territory of any kind that can be rendered profitable and available.

* * * * * * * * *

The large payments of moneys to the Indians of these tribes within the last few years have been attended by many and apparently well-authenticated complaints of fraud, and those making such payments, with others associated with them in the business, have, by unfair means and improper use of the advantages afforded them, acquired large fortunes, and in many instances private persons entitled to payments have received but little benefit therefrom. And worse still is the fact that the places of payments were thronged with evil characters of every possible caste, by whom the people were swindled, defrauded, robbed, and grossly debauched and demoralized. And in case of further payments of money to them the Government should make such disbursements to the people directly through one of its own officers.

* * * * * * * * *

Justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain. The United States put the title to a domain of countless wealth and unmeasured resources in these several tribes or nationalities, but it was a conveyance in trust for specific uses, clearly indicated in the treaties themselves, and for no other purpose. It was for the use and enjoyment in common by each and every citizen of his tribe, of each and every part of the Territory, thus tersely expressed in one of the treaties: "To be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole." The tribes can make no other use of it. They have no power to grant it to anyone, or to grant to anyone an exclusive use of any portion of it. These tribal governments have wholly perverted their high trusts, and it is the plain duty of the United States to enforce the trust it has so created and recover for its original uses the domain and all the gains derived from the perversions of the trust or discharge the trustee.

The United States also granted to these tribes the power of self-government, not to conflict with the Constitution.

They have demonstrated their incapacity to so govern themselves, and no higher duty can rest upon the Government that granted this authority than to revoke it when it has so lamentably failed.

Extracts from Report of Dawes Commission, dated November 18, 1895

A greater familiarity with the condition of affairs in the Territory than the Commission had at the time of making their last report, does not enable it to abate anything of its representation of the deplorable state of affairs as therein stated. They are not only compelled to reaffirm all that they reported of the utter perversion of justice by those who have gotten possession of the machinery and funds of its administration in the Territory, inflicting in its name and that of the law-making power irreparable wrongs and outrages upon a helpless people for their own gain, but they are compelled to report that statistics and incontrovertible evidence shows a much more deplorable and intolerable state of affairs than was there represented.

* * * * * * * * *

The Commission is compelled to report that so long as power in these nations remains in the hands of those now exercising it, further effort to induce them by negotiation to voluntarily agree upon a change that will restore to the people the benefit of the tribal property and that security and order in government enjoyed by the people of the United States will be vain.

The Commission is therefore brought to the consideration of the question: What is the duty of the United States Government toward the people, Indian citizens and United States citizens, residing in this Territory under governments which it has itself erected within its own borders?

No one conversant with the situation can doubt that it is impossible of continuance. It is of a nature that inevitably grows worse, and has in itself no power of regeneration. Its own history bears testimony to this truth. The condition is every day becoming more acute and serious. It has as little power as disposition for self-reform.

Nothing has been made more clear to the Commission than that change, if it comes at all, must be wrought out by the authority of the United States. This people have been

wisely given every opportunity and tendered every possible assistance to make this change for themselves, but they have persistently refused and insist upon being left to continue present conditions.

There is no alternative left to the United States but to assume the responsibility for future conditions in this Territory. It has created the forms of government which have brought about these results, and the continuance rests on its authority. Knowledge of how the power granted to govern themselves has been perverted takes away from the United States all justification for further delay. Insecurity of life and person and property increasing every day makes immediate action imperative.

The pretense that the Government is debarred by treaty obligations from interference in the present condition of affairs in this Territory is without foundation. The present conditions are not "treaty conditions." There is not only no treaty obligation on the part of the United States to maintain, or even to permit, the present condition of affairs in the Indian Territory, but on the contrary the whole structure and tenor of the treaties forbid it. If our Government is obligated to maintain the treaties according to their original intent and purpose, it is obligated to blot out at once present conditions. It has been most clearly shown that a restoration of the treaty status is not only an impossibility, but if a possibility, would be disastrous to this people and against the wishes of all, peoples and governments alike. The cry, therefore, of those who have brought about this condition of affairs, to be let alone, not only finds no shelter in treaty obligations but is a plea for permission to further violate those provisions.

The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all of their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect.

There can be no higher obligation incumbent upon every branch of the General Government than to exert its utmost constitutional authority to secure to this people, in common with all others within our borders, government in con-

formity with constitutional authorities. The Government cannot abdicate or transfer to other shoulders this duty as to any portion of territory or people in the land. It cannot escape responsibility if the dark record which has now been brought to light is permitted to continue. Delay can bring nothing but increased difficulty and danger to peace and good order in the Territory. The situation calls for prompt action. These considerations lead but to one conclusion.

It is, in the judgment of the Commission, the imperative duty of Congress to assume at once political control of the Indian Territory. They have come with great reluctance to this conclusion, and have sought by all methods that might reach the convictions of those holding power in the Territory to induce them by negotiation and mutual agreement to consent to a satisfactory change in their system of government and appropriation of tribal property. These efforts have failed, and the Commission is driven to the alternative of recommending abandonment of these peoples to the spoliation and outrages perpetrated in the name of existing governments or the resumption by Congress of the power thus abused.

Extracts from report of Dawes Commission, dated October 3, 1898.

"In the meanwhile, in contemplation of the conditon in which the Territory would be left by the possible failure to ratify pending agreements, Mr. Curtis, of the Indian Committee of the House, addressed himself to the preparation of a bill, the general design of which would be to transfer the control of the property rights in these nations from tribal authority to that of the United States, much the same as their political government had been transferred by the act which was to take effect January 1898. The result of this undertaking of Mr. Curtis, on which he bestowed much time and exhaustive labor, availing himself of all the assistance of others which he could command, has been the act entitled 'An act for the protection of the people of the Indian Territory and for other purposes,' known as the 'Curtis bill.' The knowledge of the preparation of this bill aroused great opposition of those in the Territory opposed to any change in the exclusive use of tribal property

by the few controlling the government of the Territory. Accordingly large delegations were sent to Washington, at great expense to their national treasuries, for the purpose of preventing such legislation and procuring, if possible, the repeal of the law taking away so much of their political power, which was to take effect January 1, 1898. It was deemed necessary, therefore, to require the presence of the commission in Washington during the pendency of such legislation to give information to the committees having it in charge as to the real condition of the Territory and the needs and character of the legislation proposed. At the request of these committees, and with the approval of the Department, the commission remained in Washington until final action upon this bill, rendering such assistance as was in its power to the several committees, based upon accurate and reliable information in relation to the many questions involved in the comprehensive scope of the proposed measure, as well as upon their experience and observation while in the Territory. After many changes and modifications, it is believed to have taken the best final shape possible under the circumstances."

5 Comp. Dec. 93.

Payments to Creek Indians.

The provision in the act of June 28, 1898, which prohibits the payment of any moneys by the United States to any of the tribal governments of the Indians, or to any officer thereof for disbursement does not apply to the Creek Indians, other provision of law having been made therein for payments to them.

(Assistant Comptroller Mitchell to the Secretary of the Interior, August 30, 1898.)

I have received your letter of July 23, 1898, as follows:

"The Indian appropriation act, approved July 1, 1898 (30 Stat. 571), makes the following appropriations for the Creek Nation of Indians, namely:

" 'For permanent annuity, in money, per fourth article of treaty of August seventh, seventeen hundred and ninety, and fifth article of treaty of August seventh, eighteen hundred and fifty-six, one thousand five hundred dollars;

" 'For permanent annuity, in money, per second article of treaty of June sixteenth, eighteen hundred and two, and fifth article of treaty of August seventh, eighteen hundred and fifty-six, three thousand dollars;

" 'For permanent annuity, in money, per fourth article of treaty of January twenty-fourth, eighteen hundred and twenty-six, and fifth article of treaty of August seventh, eighteen hundred and fifty-six, twenty thousand dollars;

" 'For permanent annuity for blacksmith and assistant, and for shops and tools, per eighth article of treaty of January twenty-fourth, eighteen hundred and twenty-six, and fifth article of treaty of August seventh, eighteen hundred and fifty-six, eight hundred and forty dollars;

" 'For permanent annuity for iron and steel for shop, per same articles and treaties, two hundred and seventy dollars;

" 'For permanent annuity for the pay of a wheel-wright per same articles of same treaties, six hundred dollars;

" 'For five per centum interest on two hundred thousand dollars, for purposes of education, per sixth article of treaty

of August seventh, eighteen hundred and fifty-six, ten thousand dollars;

"'For interest on two hundred and seventy-five thousand one hundred and sixty-eight dollars, at the rate of five per centum per annum, to be expended under the direction of the Secretary of the Interior, under provisions of third article of treaty of June fourteenth, eighteen hundred and sixty-six, thirteen thousand seven hundred and fifty-eight dollars and forty cents; in all, forty-nine thousand nine hundred and sixty-eight dollars and forty cents.'

"The Creek Nation is one of the Five Civilized Tribes of Indian Territory.

"The act approved June 28, 1898, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes' (30 Stats., 495, 502), particularly relates to the affairs and government of these Five Civilized Tribes, and in section 19 provides:

"'That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States and the same shall not be liable to the payment of any previously contracted obligation.'

"This section as it passed the House did not contain the words 'by the United States,' following the words 'hereafter be made,' in the early part of the section, but did contain the words 'all expenses incurred in transacting their business and of,' following the words 'but payment of,' near the middle of the section. In the course of the consideration of the measure in the Senate section 19 was amended by inserting the words 'by the United States' above mentioned and by striking out the words 'all expenses incurred in transacting their business and of' above mentioned. These amendments were known in the Senate as Nos. 28 and 29, respectively, and were suggested by the Committee on Indian Affairs in that body. The bill as it passed the House was reported to the Senate by the Committee upon Indian Affairs with amendments, among which were those in question, but no written or printed report was made in explanation of the amendments suggested by the committee,

and neither were they explained upon the floor of the Senate or House. The bill went before a conference committee of the two Houses, whose favorable action led to the retention of the Senate amendments to section 19.

"Heretofore under the treaties with the Creeks the moneys appropriated in fulfillment of the treaty stipulations with that tribe have been paid under the direction of the Secretary of the Interior to the treasurer of said tribe, to be disbursed by him under the laws of said tribe.

"It will be seen that the moneys included in the appropriations in question do not necessarily go to members of the tribe and neither are they per capita payments. They are, however, payments of money on a specified account made by the United States to the tribal government or its tribal treasurer for use and disbursement. The purposes for which the appropriations are made, as shown by the appropriation act and by the treaty stipulations, are varied in character, including the support of the tribal government and the maintenance of public schools.

"The treaty of August 7, 1856, with the Creek Indians, under which several of these appropriations are made, contained the following provisions in Article VII (11 Stat., 699, 702):

" 'It being the desire of the Creeks to employ their own teachers, mechanics, and farmers, all of the funds secured to the nation for educational, mechanical, and agricultural purposes shall, as the same become annually due, be paid over by the United States to the treasurer of the Creek Nation. And the annuities in money due the nation under former treaties shall also be paid to the same officer whenever the general council shall so direct.'

"The appropriations made by the Indian appropriation act of July 1, 1898, aforesaid, are now available, and the tribe insists that they should be paid as heretofore to the tribal treasurer for disbursement, and that the moneys covered by these appropriations are not payable to members of such tribe because of their membership or by way of any per capita distribution, but that they are payable for official or other services rendered, work performed, or material furnished, as the case may be, under the laws of said tribe, made in pursuance to existing treaties, and that such appropriations do not therefore come within the purview of section 19 of the act of June 28, 1898, *supra*. The fact

that the words 'all expenses incurred in transacting their business and of' were stricken out of section 19 as it passed the House of Representatives is referred to in support of the contention of the tribe. On the other hand, attention is called to that part of said section 19 which directs 'that no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement.'

"I beg to inquire whether the moneys covered by the appropriations in question can be paid to the tribal government or its treasurer, as heretofore, or whether these appropriations come within the provisions of section 19 of the act of June 28, 1898, *supra*, and are required to be paid out or disbursed under the direction of the Secretary of the Interior by an officer appointed by him.

"In connection it is submitted that there is urgent occasion for the early application of this money to the purpose for which it was appropriated, but before action in the premises it is desired to obtain an authoritative determination as to the manner of disbursement."

"The authority of Congress to nullify a treaty by statute law seems to be well settled."

"The power to abrogate or modify a treaty does not rest exclusively in the hands of the President and Senate of the United States; but Congress, in the exercise of the law-making and law-repealing power, may render a treaty of no effect. And the courts have no right to inquire into the wisdom of such action of the legislative department of the Government. So, whether a particular law violates a treaty obligation is not a question of judicial cognizance, and the courts can not declare it void on that ground. This question addresses itself to the political department of the Government, and must be settled by international negotiation." (Am. and Eng. Law Ency., vol. 26, p. 553, and cases there cited.)

There does not seem to be room for serious doubt as to the meaning of the opening lines of section 19, of the act of June 28, 1898, *supra*. They import a plain, unqualified, and comprehensive prohibition of all payments by the United States to the tribal governments, or any officer thereof, on any account whatever for disbursement. Had the intent been simply to provide for payments to members of the tribes, either per capita or otherwise by a disbursing officer

of the United States, the prohibition found in the first three lines was unnecessary. In view of this plain prohibition I think no payments can be made to the Creek authorities if the section applies to them. Does it apply, and if so, to what extent?

The agreement made with the Creek Indians September 27, 1897, was ratified by Congress and is a part of the same act of June 28, 1898. Section 30 of the act provides:

"And if said agreement (with the Creeks) as amended be so ratified, the provisions of this act shall then only apply to said tribe where the same do not conflict with the provisions of said agreement; * * *."

Paragraph 38 of said agreement provides:

"This agreement shall in no wise affect the provisions of existing treaties between the Muscogee or Creek Nation and the United States, except in so far as it is inconsistent therewith."

Paragraph 35 of the agreement provides:

"All payments hereafter to be made to the members of the said nation shall be paid directly to each individual member by a bonded officer of the United States, * * *."

It may be that paragraph 35 is in conflict with the provisions of existing treaties, and if so the treaties must yield. In so far as payments to members, as members, of said nation are concerned. Even this would not prevent a payment to a Creek Indian for services rendered.

With the exception found in paragraph 35 of the agreement, the existing treaties remain in full force so far as payments to the tribal authorities are concerned.

Section 7 of the treaty of August 7, 1856 (11 Stat., 702), provides:

"It being the desire of the Creeks to employ their own teachers, mechanics, and farmers, all of the funds secured to the nation for education, mechanical, and agricultural purposes shall, as the same become annually due, be paid over by the United States to the treasurer of the Creek Nation. And the annuities in money due the nation under former treaties shall also be paid to the same officer whenever the general council shall so direct."

Under this provision all funds due the nation for educational, mechanical, and agricultural purposes, under the treaty of 1856 and prior treaties, can now be paid over to the treasurer of the nation; and all annuities in money due

the nation under treaties prior to that of August 7, 1856, can now be paid to said treasurer whenever the general council shall so direct, subject in all cases, however, to the exception found in paragraph 35 of the agreement ratified by the act of June 28, 1898.

The above applies to the appropriations mentioned by you in the first part of your letter, except the $13,758.40 appropriated under provisions of third article of treaty of June 14, 1866 (14 Stat., 786), being interest at 5 per cent per annum on $275,168. This article of the treaty in part provides:

"The United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, * * *; the residue, two hundred and seventy-five thousand one hundred and sixty-eight dollars ($275,168) shall remain in the Treasury of the United States, and the interest thereon, at the rate of five per centum per annum, be annually paid to said Creeks as above stipulated."

Under the provisions of this treaty it rests solely with the Secretary of the Interior to determine in what manner and for what purposes this $13,758.40 shall be disposed of for the benefit of the Creeks, provided that it be not paid to the members of said nation in contravention of paragraph 35 of the agreement found in the act of June 28, 1898.

The conclusion reached, that the tribal authorities may be recognized in making payments as above stated, must be understood to apply only from and after the ratification of the agreement. Prior to that time section 19 of the act of June 28, 1898, as herein construed, applies.

SUPREME COURT OF THE UNITED STATES.

No. 172.—October Term, 1936.

The United States, Petitioner,
vs.
The Seminole Nation.

On Writ of Certiorari to the Court of Claims.

[January 4, 1937.]

Mr. Justice Butler delivered the opinion of the Court.

An Act of Congress approved May 20, 1924, 43 Stat. 133, authorized the above named court to adjudicate claims of the Seminole Nation against the United States, declared all forever barred unless suit be brought within five years, directed adjudication of claims of the United States against that nation and gave right of review in this court. A Joint Resolution of May 19, 1926, 44 Stat. 568, permitted plaintiff to bring separate suits on one or more causes of action. Joint Resolution of February 19, 1929, 45 Stat. 1229, extended time for commencing suits to June 30, 1930. February 24, 1930, plaintiff filed its petition praying judgment in respect of causes of action alleged to have arisen after July 1, 1898. Plaintiff obtained leave and, September 19, 1934, filed an amended complaint containing allegations in respect of the claims alluded to in the original petition and attempted to set up other causes of action. But the period within which defendant permitted suit had long since expired. On December 2, 1935, the court filed its special findings of fact, conclusions of law and opinion and entered judgment in favor of plaintiff for $1,317,087.27. — C. Cls. —.

1. Plaintiff contends that the petition for the writ of certiorari came too late and that therefore this court is without jurisdiction. The petition was filed under 28 U. S. C., § 288 (b). Section 350 limits the time to three months after entry of judgment. Defendant filed timely motion for new trial which was overruled March 2, 1936. May 13 it applied for leave to file a second motion for new trial. The application stated that it was made pursuant to 28 U. S. C., § 282,[1] and that the motion was attached to the application. The court granted leave and defendant, May 18, filed its

[1] R. S., § 1088; Judicial Code, § 175; Act of March 3, 1911, 36 Stat. 1141.

second motion for a new trial. The record does not include the motion. After hearing argument the court, June 8, overruled the motion. July 8, defendant filed petition for certiorari.

Plaintiff assumes that defendant's second motion for a new trial was made under § 282 and argues that the running of time allowed for filing petition for certiorari was not postponed until the court disposed of that motion. But it does not appear that the motion was in fact one authorized by § 282. Aside from mere recital in the application for leave, there is nothing to indicate that it was not one made under Rule 91 of the Court of Claims.

That rule declares: "Whenever either party desires to question the correctness or the sufficiency of the court's conclusions on its findings of fact or to amend the same, the complaining party shall file a motion which shall be known as a motion for a new trial. All grounds relied upon for any or all of said objections shall be included in one motion. After the court has announced its decision upon such motion no other motion for a new trial, except that provided by United States Code, title 28, section 282, shall be filed by the same party unless by leave of court. Motions for new trial, except as provided by section 175 of the Judicial Code (U. S. Code, title 28, sec. 282), shall be filed within 60 days from the time the judgment of the court is announced".

Section 282 provides: "The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion, on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States . . . ."

The rule expressly excepts motions under § 282 from those for the filing of which leave of court must be obtained. The statute plainly implies that in accordance with its terms defendant may as of right apply for a new trial. The record does not contain anything to indicate that it was one made upon evidence or otherwise in accordance with statute. Cf. *In re District of Columbia*, 180 U. S. 250, 253. In the absence of definite showing to that effect, it will not be held that the United States applied for or that the court entertained and granted an application for leave

so expressly shown to be unnecessary. On this record, it is reasonably to be inferred, and we find, that the second motion was one filed in accordance with the rule under which application for leave was necessary and not one authorized by the statute for the filing of which permission of the court was not needed. It is clear that the three months' period, § 350, did not commence to run until the court disposed of that motion and did not expire until long after the defendant had filed its petition for this writ. It is well settled that the time within which application may be made for review in this court does not commence to run until after disposition of motion for a new trial seasonably filed and entertained. *Brockett* v. *Brockett*, 2 How. 238, 240. *Texas & Pacific Railway Co.* v. *Murphy*, 111 U. S. 488, 489. *United States* v. *Ellicott*, 223 U. S. 524, 539. *Citizens Bank* v. *Opperman*, 249 U. S. 448, 450. *Morse* v. *United States*, 270 U. S. 151, 153-154. *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498. This court has jurisdiction.

2. The jurisdiction of the lower court was limited to claims sued on before the expiration of the period within which the United States consented to be sued. It did not extend to any cause of action which was not alleged in plaintiff's original petition. As the United States may not be sued without its consent, causes of action not alleged within the period allowed may not be enforced. *Finn* v. *United States*, 123 U. S. 227, 232. The amended petition was not filed within the time allowed; no cause of action was by it brought within the power of the court. *Taylor Co.* v. *Anderson*, 275 U. S. 431, 438-439. *B. & O. S. W. R. Co.* v. *Carroll*, 280 U. S. 491, 495. The judgment may not be sustained as to any item that is not included in a cause of action set up in the original petition or that was by the findings of the lower court or otherwise put upon a ground not there alleged. *Harrison* v. *Nixon*, 9 Pet. 483, 503. *Boone* v. *Chiles*, 10 Pet. 177, 209. *Garland* v. *Davis*, 4 How. 131, 148. It may not be upheld as to any item that is not supported by definite findings of fact extending to all essential issues and which, unaided by statements in the court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover. *United States* v. *Esnault-Pelterie*, 299 U. S. —, —.

The original petition is in paragraphs designated by roman numerals; the substance of each may be briefly shown:

I. Reference is made to the Act conferring jurisdiction. II. Plaintiff for many years was the owner of funds held in trust by defendant; there existed various treaties and agreements between plaintiff and defendant whereby the trust funds were to be managed and invested by defendant and the interest thereon paid over to the national treasurer of plaintiff. III. From and after passage of the act of June 28, 1898, 30 Stat. 495 (called the Curtis Act) defendant impounded all funds of plaintiff, refused to further pay them to plaintiff's national treasurer and proceeded to disburse them for various purposes. IV. The only authority given by that Act for the disbursement of plaintiff's funds is § 19.[2] After that Act, Congress passed others giving authority for the expenditure of plaintiff's funds, but no subsequent act gave authority for the expenditure of the funds hereinafter mentioned. VI. From "July 1st, 1898, until the present time, defendant, in violation of its duty as trustee of the funds of plaintiff, in violation of the rights of plaintiff under its various treaties and agreements with defendant, and without authority of Congress, has spent large sums of the trust funds of plaintiff". VII. At all times mentioned in the petition R. S., § 2097, was in force.[3] VIII. "Defendant has thus spent, in violation of law, a large amount of the trust funds of plaintiff". The exact amount will be shown by the books and records of defendant.

The prayer of the petition is that defendant be required to file in this cause a statement showing its expenditures of plaintiff's funds "during said period," the purposes for which, and dates when, such expenditures were made, and the authority of law, if any, which authorized defendant to make such expenditures; "that, if necessary thereafter, plaintiff be permitted to amend this peti-

[2] "That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation". 30 Stat. 502.

[3] "No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law". 25 U. S. C., § 122.

tion" and that plaintiff have judgment against the defendant in such sum or sums as shall appear to the court to have been expended without authority of law, with interest at six per cent.

This petition does not include any cause of action that accrued prior to July 1, 1898. Nor is recovery sought on mere failure of defendant to pay plaintiff's funds to its national treasurer or to the Seminoles per capita. The gist of the petition is that defendant disbursed funds of plaintiff for "various purposes" (par. III); and in violation of its duty as trustee and of plaintiff's rights under "treaties and agreements" and "without authority of Congress, has spent large sums of the trust funds of plaintiff" (par. VI). The petition extends to no amount not "thus spent" (par. VIII). It prays statement by defendant only as to "expenditures" of plaintiff's funds "during said period", and seeks judgment only for such sums as appear to the court to have been "expended".

While the amended petition came too late to bring in any additional cause of action or to change grounds on which plaintiff rested its suit, it will be taken into account to the extent that it usefully gives plaintiff's statement of details of causes of action alleged in the original petition and for comparison with the court's special findings of fact. It describes 13 claims; ten of these are in whole or in part included in the judgment. The following state-

ment shows: (1) Paragraphs of the amended petition; (2) Amounts claimed in each; (3) Items identified by arabic numbers used in the opinion below; (4) Amounts of items considered; (5) Findings identified by roman numerals; (6) Amounts included in the judgment; (7) Amounts excluded below.

(1)	(2)	(3)	(4)	(5)	(6)	(7)
III	$63,353.42					
		1	$61,563.42	IV	$61,563.42	
		4	1,790.00	VII	1,790.00	
IV	304,551.28					
		2	150,000.00	V		$150,000.00
		3	154,551.28	VI	154,551.28	
V	90,597.20					
		5	3,097.20	IX	3,097.20	
			750.00		750.00	
			57,500.00		57,500.00	
			[29,250.00]*			29,250.00*
VI	15,000.00					
		6	15,000.00	X		15,000.00
VII	10,000.00					
		7	10,000.00	XI	9,068.24	931.76
VIII	864,702.58					
		8	864,702.58	XII	864,702.58	
IX	154,455.30					
		9	154,455.30	XIII	154,455.30	
X	66,247.37					
		10	51,460.08	XIV		51,460.08
		11	3,909.96	XIV	3,909.96	
		12	4,348.74	XV	4,348.74	
			[6,528.59]†			6,528.59†
XI	178,533.42					
		13	178,533.42	XVI	1,350.55	177,182.87
	$1,747,440.57		$1,747,440.57		$1,317,087.27	$430,353.30

* Not dealt with in the opinion. This amount is made up of a duplication of $26,750, interest for 1899-1909 excluded from consideration because considered in item 8, plus seeming error of $2,500 in calculation of judgment allowed.

† Not dealt with in the opinion. This amount apparently was not claimed in proposed findings of fact, although claimed in amended petition, i. e. included in claim for $66,247.37.

The lower court disallowed all of items 2, 6 and 10 and parts of 5, 7 and 13. Plaintiff has not asked review. Defendant's prayer for reversal does not extend to any part of items 11, 12 or 13.

Items 1, 4 and 7 are by the amended petition indicated to be outside the period alleged in the original petition—from July 1, 1898, to the time of the commencement of the suit. The findings fail to show that any part of these amounts is included in any

cause of action alleged in the original petition to have accrued in that period. All of these items must be deducted from the judgment.

Item 3, $154,551.28, is a part of $304,551.28 first described in the amended petition. Of that amount $150,000 (item 2) was disallowed. The amount included in the judgment rests on special finding VI which is to the effect that commencing with the Act of July 26, 1866 (14 Stat. 263-264) up to and including the Act of April 30, 1908 (35 Stat. 91) Congress annually appropriated $25,000 being the interest at 5% on the $500,000 fund provided in the eighth article of the Treaty of 1856 for the purpose of making per capita payments, and that the United States disbursed the sums thus appropriated for the years involved, either by direct payment per capita to members of the tribe, or by cash payment to the treasurer of the Seminole Nation, *except* interest in years between 1867 and 1879 inclusive, the total of which is $92,051.28, and interest in the years 1907 to 1909 inclusive, amounting to $62,500; and that these items of interest were neither disbursed to members of the tribe nor paid to the treasurer.

But defendant's retention or other disposition of the amounts of interest in years between 1867 and 1879 is not shown by the findings to have been within the period covered by the original petition. For that reason $92,051.28 must be deducted. And for another reason all of item 3 must be eliminated from the judgment. The finding merely shows that defendant did not pay or disburse the amount included in that item to the national treasurer or to members of the tribe. That is not enough. The suit is not to recover money withheld but only for that illegally disbursed or spent by defendant.

Item 5—$90,597.20—as described in the amended petition is interest on the permanent school fund provided for in the third article of the Treaty of 1866. The judgment includes $3,097.20 of that item on account of interest for the years 1867-1874. But it is not shown that any cause of action accrued in respect of that sum after July 1, 1898. The item also includes $750, a part of the interest for 1907 found not to have been paid by defendant to the tribal treasurer. But, as shown above, mere failure so to pay is not sufficient to constitute any cause of action alleged in the original petition. The balance of item 5 includes $57,500, payments to

the tribal treasurer before the passage of the Curtis Act and before commencement of the period covered by the original petition. They must be excluded. The remainder of this item is also a part of item 8 about to be considered. See opinion below, p. —.

Item 8—$864,702.58—is based on a claim which is described in the amended petition, in substance as follows: After the passage of the Curtis Act, defendant impounded all the funds of plaintiff, and assumed full administrative control over the disbursement of same. Notwithstanding "the plain inhibition in said Section 19 that no payments thereafter should be made to 'the tribal governments or to any officer thereof for disbursement', yet in violation of said section the defendant illegally disbursed the amounts hereinafter set forth, derived from" stated sources.[4] "Therefore, the defendant is liable to the plaintiff in the amount of $864,702.58 for the violation of said Section 19 of said Act of June 28, 1898."

This claim is not included in the original petition. It states defendant refused to make payments to the tribal treasurer. Finding XII shows that defendant did pay to the treasurer all the amounts included in the item. The original petition not only failed to lay foundation for the claim but in effect excluded every part of it. The item is included in the judgment on a basis of fact directly opposed to the allegations of the original petition relied on by plaintiff until long after the expiration of the period within which the United States permitted suit in respect of it. The plaintiff is not entitled to recover any part of the item.

3. Item 9 is $154,455.30. Unlike the items considered above, it may be held sufficiently alleged in the original petition. The amended petition, par. IX, gives details as follows: The Original Seminole Agreement ratified by Act of July 1, 1898, 30 Stat. 567, provides that $500,000 of the funds belonging to the Seminoles shall be set apart as a permanent school fund and be held by the United States at five per cent interest. The school fund was established March 6, 1906. Defendant, in violation of the agreement and without authority of law "disbursed from the principal thereof the amount of $154,455.30." Therefore that amount "is due

[4] "Treaty of August 7, 1856, Funds $212,500.00
Treaty of March 21, 1866, Funds 29,750.00
Act of March 2nd, 1899, Funds 622,156.87
Indian Moneys, Proceeds of Labor Fund 295.71
$864,702.58"

the Seminole Nation from the defendant." As to it the court found that the Secretary of the Interior did disburse from the principal of the permanent school fund in 1920 and 1921 "per capita payments" amounting to $32,445.56; in 1921 "equalization of allotments", $490.22; in each of the years 1922 to 1930 payments for "Education" amounting in all to $121,519.52. In its opinion the court said: "That Congress had the power to change the terms of the agreement and authorize these payments, is well established,[5] but we find no act of Congress that either in express terms or by necessary implication authorizes any of them. It must, therefore, be held that they were illegally made and that the Seminole 'permanent school fund'—a trust fund—was unlawfully depleted thereby. The plaintiff is entitled to recover the sum claimed."

Congress contemplated, at least as early as 1898 at the time of the passage of the Curtis Act and the ratification of the Seminole Agreement, that the tribal government was soon to be terminated. The Act of March 3, 1903, § 8, 32 Stat. 1008, declared that it should not continue after March 4, 1906. Congress, by Joint Resolution March 2, 1906, 34 Stat. 822, continued tribal existence and tribal government until all tribal property and its proceeds should be distributed among individual members. The Act of April 26, 1906, § 28, 34 Stat. 148, continued tribal existence and government for all authorized purposes until otherwise provided by law. By Acts passed in 1906 and 1908 Congress directed the Secretary of the Interior to take possession of all buildings used for governmental, school or other tribal purposes, together with the furniture and land pertaining thereto and to sell the same and deposit the proceeds to the credit of the Seminoles.[6] Liquidation of Seminole property and distribution of its proceeds per capita went forward under direction of Congress.[7] And, by May 25, 1918, when the Congress passed the Act making appropriations for the Bureau of Indian Affairs for the fiscal year ending June 30, 1919, under which defendant claims that the per capita payments here in question were made, the need of a permanent school fund had almost ended. At the hearing upon that measure before the House Committee on

[5] Lone Wolf *v.* Hitchcock, 187 U. S. 553, 564-567.

[6] Act of April 26, 1906, §§ 15-17, 34 Stat. 143. Act of April 30, 1908, 35 Stat. 71.

[7] Acts: March 3, 1911, § 17, 36 Stat. 1070. August 22, 1911, 37 Stat. 44. June 30, 1913, § 18, 38 Stat. 95. March 2, 1917, § 18, 39 Stat. 983-984.

Indian Affairs,[8] the Bureau, through the Assistant Commissioner, reported that one of the two Seminole Academies had already ceased to exist, that the other was still used but that public school privileges were within the reach of almost every pupil and that the fund was not needed for the support of any other school. It was on the recommendation of the Bureau that Congress included in § 18 of this Act a clause specifically authorizing the Secretary of the Interior to pay to the enrolled members of the Seminole Tribe entitled to share in its funds, or to their lawful heirs, out of the Seminole school fund not to exceed $100 per capita and directed payment to be made under rules and regulations prescribed by the Secretary.[9] The Act, like earlier ones[10] and those making appropriations for fiscal years ending, respectively, June 30, 1920, and 1921,[11] contained a proviso directing that in the specified fiscal year no money shall be expended from tribal funds without specific appropriation by Congress except "Equalization of allotments, per capita and other payments authorized by law . . ." By regulations promulgated June 17, 1918, par. 14, the Secretary required disbursements to continue "until all claims are paid or until further orders of the Department."

Plaintiff does not claim that § 18 of the appropriation Act of 1918 did not specifically authorize the use of the principal to make the per capita payments here in question. But it contends authority so to use that fund ceased with the fiscal year ending June 30, 1919. The payments authorized constituted a distribution looking

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[8] House Committee Hearings, Indian Appropriation Bill, December, 1917, p. 286.

[9] " . . . That the Secretary of the Interior be, and he is hereby, authorized to pay to the enrolled members of the Seminole Tribe of Indians of Oklahoma entitled under existing law to share in the funds of said tribe, or to their lawful heirs, out of the Seminole school fund, or any moneys belonging to said tribe in the United States Treasury or deposited in any bank or held by an official under the jurisdiction of the Secretary of the Interior, not to exceed $100 per capita: Provided, That said payment shall be made under such rules and regulations as the Secretary of the Interior may prescribe: Provided further, That in cases where such enrolled members, or their heirs, are Indians who belong to the restricted class, the Secretary of the Interior may, in his discretion, withhold such payments and use the same for the benefit of such restricted Indians. . . ." Act of May 25, 1918, § 18, 40 Stat. 580.

[10] Indian Appropriation Acts for the fiscal years beginning July 1, 1912: August 24, 1912, 37 Stat. 531; June 30, 1913, 38 Stat. 95; August 1, 1914, 38 Stat. 600; March 4, 1915, 38 Stat. 1228; May 18, 1916, 39 Stat. 148; March 2, 1917, 39 Stat. 985.

[11] Act of June 30, 1919, § 18, 41 Stat. 23. Act of February 14, 1920, § 18, 41 Stat. 427-428.

to the ultimate disposition of all tribal property. The provision expressed no limitation in respect of the time within which they were to be made. The occasion and purpose of the enactment tend strongly to negative any implication that Seminoles entitled to participate in the distribution would be barred if the Secretary failed to cause payments to be made them within the fiscal year. The provisos contained in the appropriation Acts for the fiscal years 1920 and 1921 during which the per capita payments in controversy were made reasonably may be deemed sufficient to authorize them. Weight is to be given to the Secretary's regulations, par. 13, which declared that all suspended or withheld payments were "to be disbursed at such times and in such amounts as the best interest of the persons, to whom such suspended or withheld payments are due, may demand." Plaintiff's contention that it is entitled to recover upon the ground that the per capita payments were not made within time allowed therefor is without merit. The amount of the per capita payments must be eliminated from the judgment.

As to the amount of $490.20 paid out of the school fund for "equalization of allotments", the defendant relies upon a provision in the appropriation Act of February 14, 1920, 41 Stat. 427, declaring: "That hereafter no money shall be expended from tribal funds . . . without specific appropriation . . . except as follows: Equalization of allotments . . . and other payments authorized by law to individual members of the respective tribes . . ." But defendant fails to show that the excepted payments were "authorized by law." This amount was properly included in the judgment.

As to the sum of $121,519.52 made up of payments from 1922 through 1930 for "Education", the sole question is whether Congress authorized the use of the principal of the permanent school fund for that purpose. The appropriation Acts applicable to these years authorized the Secretary of the Interior to continue Seminole schools from the tribal funds.[12] It must be assumed that when enacting these measures Congress took into account the fact that

[12] Act of March [illegible], 41 Stat. 1243; Act of May 24, 1922, 42 Stat. 575; Act of Jan. 24, 1923, 42 Stat. 1196; Act of June 5, 1924, 43 Stat. 398; Act of March 3, 1925, 43 Stat. 1148; Act of May 10, 1926, 44 Stat. 460; Act of Jan. 12, 1927, 44 Stat. 948; Act of March 7, 1928, 45 Stat. 216; Act of March 4, 1929, 45 Stat. 1577.

the Seminole school fund in pursuance of its authority had been so depleted that interest on the amount remaining in it would not meet even the lessened requirements. Its failure to limit expenditure for education to interest on the permanent fund and adherence to substantially the same form of words yearly throughout the entire period sufficiently indicate the intention of Congress that disbursements for that purpose were not limited to the interest and that principal was to be used. The inclusion of that amount in the judgment cannot be sustained.

The judgment will be reversed and the cause remanded to the lower court with directions for further proceedings in accordance with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.